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IN THE SUPREME COURT OF THE
UNITED STATES
1969

WYMAN C. LOWE,

Petition for Certiorari,

vs.

CHARLES L. WELTNER,

Respondent in Certiorari,

PETITION FOR WRIT FOR CERTIORARI FOR
REVIEW OF JUDGMENT OF THE COURT OF
APPEALS OF GEORGIA

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I N D E X

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PETITION FOR WRIT OF CERTIORARI

Now comes WYMAN C. LOWE and petitions the Court as follows in the above styled matter, in compliance with the requirements in Rule 23 of the Court, for writ of certiorari for review of the judgment of the Court of Appeals of Georgia rendered and entered on October 28, 1968 and the subsequent denial by the Supreme Court of Georgia, entered on January 13, 1969, of petition for certiorari for review of said judgment, each paragraph and subparagraph herein being numbered or lettered with the corresponding number or letter of the paragraph or subparagraph of Rule 23 to which it relates:

Compliance with Subparagraph (a) of Rule 23

No opinion of the court of the first instance, the Superior Court of Fulton County, Georgia, was delivered in the said case in connection with the final judgment rendered. The opinion of the Court of Appeals of Georgia, to which appeal was made by the plaintiff from said judgment, is officially reported in 118 Ga. App. at page 635 and in 164 S.E. 2d

at page 919. A copy of the opinion of that Court of Appeals in the case begins on page 98 of the Record, and a copy is included, in compliance with subparagraph (i) of Rule 23, in the Appendix attached hereto, beginning at page xxviii.

Compliance with Subparagraph (b) of Rule 23

(i) The date of the denial by the Supreme Court of Georgia of the petition for certiorari is January 13, 1969, and that is also the date of entry of the denial; the date of the judgment by the Court of Appeals of Georgia which is also sought to be reviewed is October 28, 1968, and that is also the date of entry of said judgment.

(ii) As there is no provision or authorization in the Rules of the Supreme Court of Georgia for the filing of any kind of motion for reconsideration of a denial of a petition for certiorari, no such motion was filed in said case in that Court. A motion filed timely by Wyman C. Lowe in the Court of Appeals for rehearing was denied on November 13, 1968. An order was rendered by Justice Hugo Black of this Court on or about April 14, 1969, granted an extension for filing petition for certiorari to and including April 30, 1969. On April 25, 1969, Justice Black signed an order granting another extension to and including May 9, 1969. Application for extension received in the office of the clerk on April 10 or 11, 1969, for the first extension. An application for the second extension was received in his office on or before April 30, 1969. Another application for extension to and including May 12, 1969, was received in the office of the clerk of this Court on May 9, 1969. No order as to that motion has yet been received.

(iii) The statutory authority believed to confer on this court jurisdiction to review the said judgment of the Court of Appeals of Georgia and the denial by the Supreme Court of Georgia of said petition for certiorari is contained in the following parts of Section 1257 of Title 28 of the United States Code:

"Sec. 1257. State courts; appeal; certiorari.

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Courts as follows:

"* * * * * * * * * *

"(3) By writ of certiorari* * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution* * * * or statutes * * * * or authority exercised under the United States".

Compliance with Subparagraph c of Rule 23

In order to aid in an understanding of what the hereinafter stated questions that will be presented for review are, some main circumstances involved in the case will be stated next. This petition for certiorari is for review of a judgment, entered on October 28, 1968, of the Court of Appeals of Georgia affirming an order of the Superior Court of Fulton County, Georgia in a primary election contest case "Wyman C. Lowe, Plaintiff vs. Charles L. Weltner, defendant". That order granted a motion of the defendant to dismiss the cause for failure of the plaintiff "to state a claim upon which relief can be granted", granted the same motion as one for summary judgment, and dismissed plaintiff's petition. The plaintiff and defendant had been the only candidates for nomination for Representative for the Fifth Congressional District of Georgia in the United States House of Representatives in the Democratic Primary held on September 11, 1968. In his amended and substituted petition that was before the Superior Court at the time of the hearing of that motion on September 20, 1968, the plaintiff contested the result, which showed the defendant the winner. The plaintiff's allegations showed that he was following the contest procedure prescribed in Chapter 34-17, entitled "Contested Primaries and Elections", of the Georgia Election Code, which is Title 34 of the Code of Georgia, and that he contested on three of the five grounds upon which Section 34-1703 of that Chapter authorizes a contest to be brought. His allegations show the one

of those three grounds, as set forth in that Code section, upon which he relied mainly was:

> "(a) Malconduct, fraud or irregularity by any primary or election official or officials sufficient to change or place in doubt the result".

Among other allegations, he charged principally malconduct, fraud or irregularities by poll officers at each of eleven polling places he identified by location, also as "where the electors were mainly black persons", and also "at almost every other polling place in the 5th District where the voters were mainly of the Black Race*****sufficient to change the result of the Primary as to that office or place it in doubt". All of the Fifth Congressional District, which contains most of the area of the City of Atlanta, lies within Fulton County, but about one-seventh of the residents of Fulton County reside outside that Fifth District. The parts of the transcript contained in the Appendix attached hereto show the Trial Judge granted at a hearing, only four days after the case was commenced, the motion to dismiss on basis of contention made by an attorney for the defendant at the hearing that plaintiff did not identify with "particularity" enough of the polling places "where electors mainly of the Black Race", as to which he made said hereinbefore quoted allegations with respect to wrong doing by

poll officers, to show the votes cast in such polling places were sufficient to change or place in doubt the result.

Some of the parts of the reporter's transcript contained in the Appendix hereto also show that, in connection with the granting of the motion as one for summary judgment, there was excluded from consideration by the Court the votes cast for the two candidates in all said polling places in precincts in the Fifth District where the electors (registered voters) were predominantly black persons except said eleven polling places the plaintiff identified by location; and that consideration was given by the Court, in connection with the motion as one for summary judgment, to the testimony of Mr. William Graham, Jr., Supervisor of Elections for Fulton County adduced at the hearing, to the effect, that a total of 5,414 votes were cast for the two candidates in only said eleven polling places and that number of votes was insufficient to change or place in doubt the result. There is only one polling place in each of the 155 precincts in that Fifth District.

As will be pointed out more definitely in the statement of the case or argument hereinafter, petitioner, at least twice during the said hearing, held only four days after the original petition was filed and only nine days after the date of the Democratic Primary, requested the Court to grant a short recess to allow him

to amend his pleading by adding identification of each of the additional polling places in precincts where the registered voters, where mainly black persons, he having alleged wrong doing in which polling places by poll officers on the date of the Democratic Primary; and twice the Court stated, in effect, it thought it should allow him to amend, one of those times stating it thought it had a duty to allow petitioner to amend, but never allowing him to amend before the hearing ended.

A photocopy of "Voting Summary", showing as to each of the precincts in the Fifth District the votes cast for each of the two candidates in that Democratic Primary and the registration then, separately, of Negro and white voters, was identified at that hearing by said Mr. Graham, Supervisor of Elections for Fulton County, a witness called for the defendant, as a summary prepared by Data Processing Department of Fulton County, and was stipulated at that hearing as evidence by counsel for the parties, all of which being shown in some of the parts of the reporter's transcript included in the Appendix hereto and in that transcript which begins on page 37 of the Record. The photocopy of said "Voting Summary" was not included as an exhibit with the transcript when the reporter's transcript was filed with the Clerk of the Superior Court and was not transmitted by that Clerk as a part of the record to the Court of

Appeals of Georgia. However, as shown in the transcript, Mr. Robert Miller, of counsel for the defendant, stated with respect to the "Voting Summary":

> "I believe under the law, since it is the official government record in and of itself it is a valid record".

Also the Opinion of the Georgia Court of Appeals in the case, included in the hereto attached Appendix, contains statement that Court judicially recognized the returns of that Primary and refers to a copy of that "Voting Summary" as attached to a brief of the plaintiff-appellant. A copy of that "Voting Summary" appears in three pages in the Appendix hereto.

That "Voting Summary" shows that there are 155 precincts in that Fifth District and that in each of forty of those precincts more than one-half of the registered voters were Negroes on the date of the Primary. The number-letter identification, such for example as "1 K", of each of those forty precincts is circled in the left column of the "Voting Summary". That "Summary" further shows almost 25,000 votes were cast in that Democratic Primary in those forty precincts for the two said candidates.

Mr. Graham referred to and read from the "Voting Summary" while testifying at the hearing. He testified, in effect, that the total votes in the Fifth

District for Weltner was 22,091 more than the total votes for Lowe. It is evident from that majority of votes for Weltner shown in his testimony (Appendix hereto) and the votes shown by the "Voting Summary" to have been cast in the said forty precincts that, if Weltner had received 11,100 votes less than he was credited with receiving in said forty precincts and Lowe had received 11,100 more votes than he was credited with receiving in them, Lowe would have won Fifth District-wide. Mr. Graham testified the total votes for Weltner in the eleven polling places specifically identified in plaintiff's pleading were 4,941, and the total of votes for Lowe in them was 473. The "Voting Summary" shows that the total of votes for Lowe in 115 of the 155 precincts in the Fifth District was greater than the total of votes for Weltner in those 115 precincts.

Number 4 in the Enumeration of Errors (assignment of errors) filed by the appellant, Wyman C. Lowe, in the Court of Appeals of Georgia at the time of filing his first brief in that Court in his appeal from the said Order of the Superior Court of Fulton County, rendered on September 20, 1968, following said hearing on that date, reads:

> "4. The Court erred in not permitting plaintiff's request for a recess to permit him time to amend his*****amended complaint

> "in such manner as to indicate specifically the address of the additional polling places where he alleged mainly black persons voted and in not allowing him to amend and then in not allowing him to have witnesses present testify as to malconduct, fraud or irregularities by poll officers, including clerks, at all the polling places he alleged and was prepared to so prove mainly black persons voted".

The Opinion of that Court of Appeals, copy being in the Appendix hereto and another copy in the record, shows that the Court completely ignored the heretofore quoted No. 4 of the Enumeration of Errors and that no reference whatever is made in the Opinion to any issue as to plaintiff's right to have been allowed to amend to identify the additional 29 of said 40 precincts or to his right to have had testimony of any of his witnesses who were in the courtroom but were not allowed to testify.

In the light of the foregoing statements of circumstances in the case, one main question presented for review is: Did the Court of Appeals err in apparently apparently failing to consider the issue raised in the No. 4 Enumerated Error by plaintiff's repeated requests to be allowed to amend, the statements of the Trial Court it thought it should allow him to amend,

including a statement it thought it had a duty to allow him to amend, its failure to allow him to amend and have his witnesses in the courtroom testify as to wrong doing by poll officers in any of said 40 polling places, in short the issue raised as to whether the Trial Court abused its discretion in these respects?

A question related to the foregoing one is: Was there violation of the provision in the 14th Amendment of the United States Constitution forbidding any State to "deprive any person*****of property without due process of law" by such denial of the right to amend pleadings and to have plaintiff's witnesses present in courtroom to testify under the conditions stated, the right to hold office being, in effect, a property right?

Reference is made to the Order of the Trial Court rendered on September 20, 1968, following the hearing held on said date, copy of that Order being on page ix of Appendix hereto and page 25 of the record. The body of the Order reads:

> "The within and foregoing matter having come on for trial by agreement of the parties, and the defendant having made a Motion to dismiss the complaint for failure to state aclaim upon which relief could be granted and a Motion for Summary Judgment; and after citation of authority, argument of counsel, hearing of evidence, and consideration by the

> Court, it is hereby adjudged and ordered that defendant's motions are granted, and the plaintiff's complaint is hereby dismissed with prejudice and judgment granted to defendant, costs being cast the plaintiff".

A copy the Record, certified under the hand and seal of the Clerk of the Court of Appeals of Georgia as all the Record will accompany the printed copies of the petition for certiorari to the Office of the Clerk of this Court. A search of that record will reveal that the only motion of any defendant in the record is the one entitled "CO-DEFENDANT'S MOTION TO DISMISS" which appears on page ix of the Appendix hereto and page 13 of the Record, to which reference is now made. The petition originally filed (Record, pp. 3-5) shows that two defendants were named in it "CHARLES L. WELTNER and WILLIAM C. GRAHAM, Supervisor of Elections in Fulton County *****". The amended and substituted petition (Appendix hereto, p. i and Record, p. 15) shows the only defendant named in it is Charles L. Weltner, petitioner's only opponent in said Democratic primary for the office stated, the introductory paragraph of the amended pleading showing said Supervisor of Elections was stricken as a defendant.

It is stated in paragraph 6 of that amended pleading that "The result of said Primary***** is contested herein under

the provisions of Chapter 34-17 of the Code of Georgia*****, that title being known as the Election Code of Georgia *****". The title of that chapter is Contested Primaries and Elections. The first Section in that chapter defines the words "contestant" and "defendant". The definition therein of "defendant", in effect, excluded said Supervisor of Elections as a defendant and clearly shows Charles L. Weltner to have been the only proper defendant in the said contest.

It is shown near the end of the Transcript of the Proceedings, which Transcript beginning on page 37 of the Record and parts of that Transcript being in the Appendix hereto, that almost at the end of said hearing it was stipulated by counsel for the defendant Weltner that, as to the Secretary of State of Georgia, whom that counsel and contended should have been joined in the case, such contention was removed. The said Order of Judgment rendered following said hearing, therefore, related only to the defendant Weltner.

Only a Motion to Dismiss was filed for the defendant Weltner. However, the said Order states the defendant made a Motion to Dismiss and a Motion for Summary Judgment. It appears that the Trial Judge treated that Motion to Dismiss as both a Motion to Dismiss and one for Summary Judgment.

A search of the Record will show that no deposition, affidavit, interrogatories,

or admissions were filed for either party before the said Judgment was rendered, granting the Motion to Dismiss as also a Motion for Summary Judgment; and that the only evidence in the Record shown to have been before the Court at the time of said hearing was oral testimony of four witnesses adduced at the hearing and the verified amended petition of the plaintiff. The introductory paragraph in said Motion to Dismiss contains the statement that"***** CHARLES L. WELTNER***** moves the Court, pursuant to the provisions of Georgia Code Annotated Sec. 81A-112 (b) (6) and (7) to dismiss the above-styled cause*****". The said "(7)" reading "failure to join an indispensable party" was, as hereinbefore shown, abandoned by the defendant near the end of the hearing. The said "(b) (6)" of Sec. 81A-112, a part of the new Civil Practice Act of Georgia, that became effective in 1967, is identical with "(b) (6)" of Rule 12 of the Federal Rules of Civil Procedure to which reference now being made.

Reference is now made to a part of the testimony of a Dr. James Tibbs, a colored pharmacist, called by the plaintiff, contained in the Transcript of the Proceedings, which begins on page 37 of the Record, and appearing in parts of that Transcript contained in the Appendix hereto:

"Q. The precincts that are referred to?

A. Are black precincts.

"**********

"Q. Do you have any general knowledge of any mal-conduct or fraud?

"BY THE COURT: This is not in issue before the Court at this time. This is a Motion to Dismiss*****"

It was not until after the hereinbefore quoted testimony of Dr. Tibbs and the hearing had almost ended that there was any intimation that the Motion to Dismiss had become a Motion also for Summary Judgment, that being shown by the following statement of an attorney for the defendant made near the end of the hearing:

"BY MR. MILLER: The proceeding today has actually turned into a Motion for Summary Judgment*****"

The foregoing quoted statement of the Court "This is not in issue before the Court at this time. This is a Motion to Dismiss" precluded any testimony by Dr.Tibbs as to malconduct or fraud by poll officers in the black precincts and also any testimony as to such by the many witnesses plaintiff then had in the courtroom to testify as to such having occurred in the said eleven polling places and many additional polling places in precincts where registered voters were mainly black persons.

In connection with the foregoing, appellant Lowe raised issues in Numbers 2 and 5 of his Enumeration of Errors (corresponding to "assignments of error")that he filed in the Court of Appeals of Georgia at time of

filing his first Brief there. Said Enumeration of Errors to which reference is now made, begins on page 94 of the Record and are contained in the Appendix hereto, next preceding therein the Opinion rendered by that Court of Appeals. Those Numbers 2 and 5 of the Enumeration of Errors are quoted next:

> "2. The Court erred in allowing the motion of the defendant to dismiss to be converted, in effect, into a motion for summary judgment, then allowing one or more of the witnesses of defendant to testify, and declining to allow many of plaintiff's witnesses then in the Courtroom to testify, and not allowing Dr. Tibbs, plaintiff's witness, to complete his testimony.
>
> "**********
>
> "5. The Court erred in not ruling whether or not the pleadings of the parties and all evidence adduced showed there was no genuine issue of fact, with respect to the motion for summary judgment, and in granting the motion for summary judgment under the conditions that the said transcript on file***** shows the motion was granted".

The new Civil Practice Act of Georgia, which became effective in 1967, is embodied in the new Title 81A of the Code of Georgia, and was modeled or based upon the Federal Rules of Civil Procedure Sec. 81A-112 (b)(6), pursuant to which the defendant brought the

Motion to Dismiss, is identical with corresponding (b) (6) of Federal Rule 12, and reads:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in section 81A-156, and all parties shall be giv n reasonable opportunity to present all material made pertinent to such a motion by section 81A-156".

A sentence in paragraph (c) of Section 81A-156 "Summary Judgment" of the Georgia Code is quoted next:

> "***** The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law*****"

Important questions that are presented for review, therefore, are: Did the Trial Court misapply or misconstrue part of (b) (6)of Section 81A-112 and Section 81A-156, "Summary Judgment", of the Georgia Code jointly to the Motion to Dismiss, fail to apply or enforce properly the requirements of Section 81A-156 to the conversion of the Motion to Dismiss into one for Summary Judgment, err in granting

the Motion as one for "Summary Judgment" on basis only of oral testimony adduced at the trial and did the Court of Appeals err by failing to give proper consideration to all of this?

Federal questions presented for review which are closely related to the questions stated in the last paragraph: Were the allowing by the Trial Court of the Motion to Dismiss to become a Motion for Summary Judgment" and the granting of "Summary Judgment" under the circumstances stated violations of the clause of the Fourteenth Amendment to the United States Constitution which forbids any State to "deprive any person of***** property without due process of law", the right to hold office being a property right?

In the first subparagraph of part 3 of the Opinion in this case of the Georgia Court of Appeals is quoted the last subparagraph of paragraph 6 of the amended and substituted petition. Copy of the amended and substituted petition is the first paper and copy of said Opinion is the last paper in the Appendix hereto. Copies of both are in the certified copy of the Record. The first part of the last subparagraph of said paragraph 6 reads:

"Such malconduct, fraud and/or irregularities by poll officers at the polling places heretofore stated, where the electors were mainly black persons, and at almost every other polling place in the 5th District where the electors were mainly of the Black Race, *****were sufficient to change the result of the primary as to that office or place it in doubt*****".

The first line in the third subparagraph of part 3 of the Opinion reads:

"The color line has no proper place in judicial determination".

Reference is now made to the third and fourth subparagraphs of part 3 of the Opinion. In said two subparagraphs, including the foregoing quoted line of one of those two subparagraphs, the Court of Appeals, in effect, infers that plaintiff, particularly in said last subparagraph of paragraph 6 of his amended pleading, drew the color line. The allegations in the plaintiff's amended and substituted petition and his statements in Nos. 1 and 4 of his Enumeration of Errors, contained in the Record and Appendix hereto, show that, in referring to polling places where the electors were mainly black persons or mainly of the Black Race, in which polling places he having alleged wrong doing and violation of election laws occurred, he so referred to them only as a means of identification of polling places involved.

In view of said statements in said subparagraphs of part 3 of the Opinion, which are indicative of the attitudeof the Court of Appeals, there is presented a Federal question of whether in said part of his pleading plaintiff drew the color line and disregarded the principle of "one person, one vote", or merely made said references to identify polling places involved.

Mr. Miller, attorney for the defendant, stipulated said "Voting Summary" at the hearing, as shown in that part of the transcript of the proceedings on page 42 of the Record and in part of that transcript in

the Appendix hereto. It is stated in the second subparagraph of part 2 of the Opinion of the Court of Appeals that "a copy of the document showing summary of total precincts returns is attached to a supplemental brief of appellant filed in this court on October 21, 1968" and also "Moreover, the court takes judicial notice of the total number of precincts and returns". A copy of that "Voting Summary" is within the Appendix hereto.

Another question presented for review is whether or not the Court of Appeals erred in affirming the granting of the motion as one to dismiss, considering that its Opinion shows it took into consideration only the votes cast in the eleven polling places identified as to location by plaintiff in his pleading and ignored the other 29 polling places in precincts where black registered voters predominated, when the allegations in the first part of the last subparagraph of paragraph 6 of plaintiff's amended and substituted petition quoted hereinbefore (Record, p.18 and Appendix hereto, p.v) are to the effect that wrong doing by poll officers occurred not only at the said 11 identified polling places, but also at "almost-every other polling place in the Fifth District where the electors were mainly of the Black Race***** sufficient to change the result of the primary as to that office or place it in doubt"; considering further that said "Voting Summary" (at end of Appendix hereto) which was before the Trial Court, after having been stipulated by counsel for the defendant, clearly indicates the 40 precincts in each of Negro registered voters predominated; and considering further Nos. 1 and 4 of appellant's "Enumeration of Errors" (Record, pp.94,95 and Appendix hereto, pp. xxv, xxvi).

Compliance with Subparagraph (d) of Rule 23

FOURTEENTH AMENDMENT (ARTICLE XIV) OF THE UNITED STATES CONSTITUTION
Sec. 1-815, Code of Georgia

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Georgia, Ann., Book 1, Title 1, 1936 Edition, pp. 47,48.

Section 81A-112, Code of Georgia, Ann.
Defenses and objections-
(b) How presented-

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing:* * * * (6) failure to state a claim upon which relief can be granted,

* * * * * * * * * * *

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of

as provided in section 81A-156, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 81A-156.

Book 23-A, Title 81A, 1967 Edition, p. 34

§ 81A-156 Summary judgment-
(c) Motion and proceedings thereon.-

The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; * * * *

Book 23A, Title 81A Code of Georgia Ann., 1967 Edition, pp. 102,103.

SECTIONS IN CHAPTER 34-17, CONTESTED PRIMARIES AND ELECTIONS, OF THE GEORGIA ELECTION CODE, 1968 EDITION, THE GEORGIA ELECTION CODE BEING TITLE 34 OF THE CODE OF GEORGIA.

Section 34-1702. Contest authorized; contestant. --

The nomination of any person who is declared nominated at a primary as a candidate for any Federal, State or county office; or the election of any person who is declared elected to any such office (except when otherwise prescribed by the Federal or State Constitution);* * * *may be contested by any person who was a candidate at such primary or election for such nomination

or office,* * * * * *

Section 34-1703. Grounds for contest.--

A result of a primary or election may be contested on one or more of the following grounds:

(a) Malconduct, fraud or irregularity by any primary or election official or officials sufficient to change or place in doubt the result;

(b) When the defendant is ineligible for the nomination or office in dispute;

* * * * * * * * * *

Section 34-1705. Petition; * * * *

(a) A petition to contest the result of a primary or election shall be filed in the office of the clerk of the superior court having jurisdiction, within five days after the official declaration of the result in dispute, and shall allege: (i) the contestant's qualification to institute the contest; (ii) the contestant's desires to contest the result of such primary or election and the name of the nomination, office or question involved in the contest; (iii) the name of the defendant; (iv) the name of each person who was a candidate at such primary or election for such nomination or office in the case of a contest involving same; (v) each ground of contest; (vi) the date of the official declaration of the result in dispute; (vii) the relief sought; and (viii) such other facts as are necessary to provide a full, particular and explicit statement of the cause of contest.

* * * * * * * * *

(d) A statement of the grounds of contest shall not be rejected, nor the proceedings dismissed by any court, for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which the primary or election is contested.

Georgia Election Code, 1968 Edition, Chapter 17.

Section 34-1307 (a), Georgia Election Code. No campaign activities within two hundred and fifty feet of polling place;* * * *

No persons, with the exception of candidates, shall solicit votes in any manner or by any means or method, nor shall any person distribute any campaign literature, newspaper, booklet, pamphlet, card, sign, or any other written or printed matter of any kind in support of any person, party, body, or proposition on any primary or election day within two hundred fifty feet (250') of any polling place or of the outer edge of any building within which such polling place is established, whichever distance is greater.

Georgia Election Code, 1968 Edition, Chapter 34-13.

Compliance with Subparagraph (e) of Rule 23

The case, a primary election contest, was set by order on September 19, 1968, of the Trial Judge for trial the next day (Record, p. 24, Appendix hereto, p.viii). It was instituted by the filing of the petition and service of copy of it and special process upon the defendant on September 16, 1969, five days after the date of the Democratic Primary, in which Charles L. Weltner, the defendant, and Wyman C. Lowe, plaintiff or contestant, had been the only candidates for nomination for Representative for the Fifth Congressional District of Georgia in the United States House of Representatives.

The contest was timely brought by the contestant in accordance and in compliance with the provisions of Chapter 34-17, "Contested Primaries and Elections", of the Election Code of Georgia, that Code constituting Title 34 of the Georgia Code, no question having been raised as to the time of institution of the contest.

All of that Fifth District lies within Fulton County, Georgia, in which most of the area of the City of Atlanta is located, but about one-seventh of the residents of

Fulton County reside outside that Fifth District.

The official result, as certified by the Board of Elections of Fulton County to the Secretary of State of Georgia showed Weltner received 22,091 votes more than Lowe. Considering the total number of votes officially determined to have been cast for the two candidates, it appears that, if Weltner had been credited with receiving 11,100 votes less than he was and Lowe had been credited with receiving 11,100 more votes than he was, Lowe would have won.

An amended and substituted petition of the plaintiff, who has since the commencement of the case acted as attorney pro se, was allowed by the Trial Judge, filed, a copy thereof served by delivering to residence of the defendant on September 19, 1968. A "Co-Defendant's Motion to Dismiss", copy of which on page ix of the Appendix hereto and in the Record, shows the motion was brought pursuant to provisions of Georgia Code Ann. Sec. 81A-112 (b) (6) and (7), and that it set forth two grounds: "1. Plaintiff has failed to state a claim upon which relief can be granted; and "2. Plaintiff has failed to join an indispensable party". During the course of the hearing on September 20, 1968 on the Motion, counsel for defendant stipulated that the second ground of the motion be withdrawn.

A "Narrative Brief of the Evidence" adduced at the September 20, 1968 hearing of the Motion, was conditionally approved by the Trial Judge after a hearing before him, attended by counsel for the parties, and was transmitted by the Clerk of the Fulton Superior Court as a part of the record

to the Clerk of the Court of Appeals of Georgia at the time of docketing of an appeal by the plaintiff from the judgment entered in the Superior Court following said hearing. The official lady reporter who took down stenographically the proceedings at the hearing was admitted two days thereafter to an Atlanta hospital for an ulcer operation, and because of her continued illness, transcript by her of the proceedings was not prepared and filed before the appeal was docketed. Within about two weeks thereafter, after she prepared the transcript, it was filed in the Superior Court, certified to the Court of Appeals, and accepted by it in lieu of the "Narrative Brief of the Evidence". That 39-page transcript begins on page 37 of the Record and relevant parts of it appear in the Appendix hereto, beginning on page x.

It is shown in part of the transcript on page xi of the Appendix hereto that plaintiff stated after the hearing had begun that he had not been served with a copy of the Motion to Dismiss. After he was then served with a copy of it, he did not protest against a hearing on that date of the Motion.

The copy of the transcript in the record and part of the copy of that transcript in the Appendix hereto show that the Court did not indicate at anytime during the hearing it was proceeding on the Motion to Dismiss as one for a Summary Judgment and that counsel for the defendant did not indicate until near the end of the proceeding that it had "actually turned into a Motion for Summary Judgment" (Appendix hereto, p. xxi). However, when plaintiff asked a witness called by him at the hearing, a colored pharmacist, Dr. Tibbs,

"Do you have a general knowledge of malconduct or fraud", the Court had stated: "This is not in issue before the Court at this time. This is a Motion to Dismiss".

The first witness, who was called by counsel for the defendant at the said hearing, William Graham, Jr., Supervisor of Elections for Fulton County, identified a copy of a "Voting Summary" as to precincts in the Fifth Congressional District in the Democratic Primary for said office held in that District on September 11, 1968. A copy of that "Voting Summary" is included in the Appendix hereto as the last paper therein. During Mr. Graham's testimony, he referred to that "Voting Summary" and read therefrom. That "Voting Summary" was stipulated in evidence by counsel for the defendant (Appendix hereto, pp. xvii, xviii). The copy thereof in the appendix has a circling of the number-letter identification, such for example as "1K", of each of the 40 precincts shown thereon as having more registered Negro voters than registered white voters. That "Summary" shows there are 155 precincts in the Fifth District, there being only one polling place in each precinct.

In the amended and substituted petition, plaintiff identified by location 11 polling places in which he alleged malconduct, fraud or irregularities by poll officers to have occurred and stated the nature of the wrong doing. In the last subparagraph of paragraph 6, he additionally alleged:

"Such malconduct, fraud and/or irregularities by poll officers at the polling places hereinbefore stated, where the electors were mainly black persons, and at almost every other polling place in the 5th District where the electors were mainly

of the Black Race * * * * * were sufficient to change the result of the Primary as to that office or place it in doubt * * * * *"

Plaintiff alleged in the first subparagraph of paragraph 6 of his said pleading that he contested the result of the Democratic Primary with respect to the declaration of Mr. Weltner being the nominee "on the grounds set forth in Section 34-1703 (a) and (b), and also under Section 34-1705 (d) of said Election Code". Said parts of said sections have been quoted in 1. (d) hereof. The one of those grounds as to which the hearing mainly related was (a) of said Section 34-1703, which reads:

"Malconduct, fraud or irregularity by any primary or election official or officials sufficient to change or place in doubt the result".

Said Supervisor of Elections for Fulton County testified, while referring to the "Voting Summary" as to the number of votes cast for Weltner and for Lowe in each of the eleven polling places where electors were mainly black persons, identified by location in said pleading. He then testified that the total votes cast for Weltner in those so identified polling places was 4,941 and the number for Lowe 473, a total of 5,414 votes.

However, a totaling of the votes shown on said "Voting Summary" to have been cast for Weltner and Lowe in the 40 precincts, including said 11 precincts, where the Negro registered voters are shown by the "Summary" to predominate indicates that Weltner was credited with receiving 23,834 votes in them and Lowe 1,360 in them,

a total of 25,194 votes in the said 40 precincts. It is clear that a subtraction of 11,100 votes from the votes Weltner was credited with receiving in said 40 precincts and addition of 11,100 votes to the total Lowe was credited with receiving in those 40 precincts would have resulted in Lowe winning 5th District-wide. The total votes said Election Supervisor testified were received by Weltner were 49,973 and the total received by Lowe 27,882. The "Voting Summary" shows that the total of votes received by Lowe in the other 115 precincts was greater than total received by Weltner in those 115 precincts. It shows also that Weltner's lead over Lowe was several hundred votes more in said 40 precincts than it was in all the 155 precincts.

The said transcript shows that at least twice, the plaintiff, attorney pro se, requested the Trial Judge to allow a short recess to permit him to amend by adding identification of the other polling places in precincts where colored registered voters predominated; that twice the Judge stated he thought he should allow plaintiff to amend, that one of those times he stated he thought he had a duty to allow plaintiff to amend, but that plaintiff was not allowed to amend.

The order or judgment rendered by the Trial Judge following the hearing (Appendix hereto, pp.ix and x and Record, p. 25) shows the Motion Dismiss was granted as such Motion and also the same motion as a Motion for Summary Judgment, the record disclosing defendant had not filed any other motion.

The record also reveals that no affidavit, deposition, answers to interrogatories, or

admissions for either party were filed before the said judgment was rendered, although paragraph (c) of Section 81A-156 of the Georgia Code, which is identical with (c) of Federal Rule 56, except that paragraph (c) of the Federal Rule contains "10 days" instead of "30 days" in the first sentence, reads in part as follows:

"The motion shall be served at least 30 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered worthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law* * * * *".

With respect to the foregoing requirement that such motion be served at least 30 days before date of the hearing, the transcript shows that at beginning of the hearing plaintiff agreed for the hearing to proceed on the Motion to Dismiss as such, of which copy had not been served upon him until after the hearing began, but at no time during the hearing agreed for hearing to proceed on the Motion as if it were one for Summary Judgment and that there was no indication by counsel for the defendant that the hearing, at which the only evidence adduced was the oral testimony of four witnesses, had become one as on Motion for Summary Judgment until near the end of the hearing when that counsel stated "The proceeding today has actually turned into a Motion for Summary Judgment" (Appendix hereto, p. xxi).

Following the entering of said judgment in the Superior Court, plaintiff appealed from the judgment to the Court of Appeals of Georgia. His "Enumeration of Errors", that he filed in the Court of Appeals at time of filing his first brief, (a copy of which being in the Appendix hereto, beginning on page xxv, and in the Record, p. 94) and the opinion and judgment rendered by the Court of Appeals, reported in 164 S. E. 2nd 919, copy beginning on page xxviii of the Appendix hereto and on page 98 of the Record, are by reference made parts hereof.

Judgment of that Court of Appeals, affirming the judgment of the Superior Court, was entered on October 28, 1968. Appellant filed a Motion for Rehearing (Record, pp. 115-138), which was denied. Subsequently, he filed in the Supreme Court of Georgia a petition for Certiorari for review of the judgment of that Court of Appeals. Denial by that Supreme Court of the petition for certiorari was made on January 13, 1969 (Record, p. 142).

This is a petition for certiorari for review of said judgment of that Court of Appeals and said subsequent denial by the Supreme Court of Georgia of petition for certiorari for review of said judgment of that Court of Appeals.

Compliance with Subparagraph (f) of Rule 23

In that preceding part of this petition, pages 3-19, inclusive, entitled "Compliance with Subparagraph (c) of Rule 23", petitioner set forth questions, including federal questions, presented for review, expressed in terms and circumstances of the case and stated conditions under which the questions, including federal questions, arose. The statements therein as to the federal questions presented for review, as to the stage in the proceedings in which the federal questions arose and as to the conditions leading to and sourrounding the arising of the federal questions are by reference made part of this portion of the petition.

A federal question presented on page 14 hereof for review is: Was there violation of the provision in the Fourteenth Amendment of the United States Constitution forbidding any State to "deprive any person * * * * *of property without due process of law "by the Trial Judge's denial of plaintiff's repeated requests to amend his pleadings in such manner as to identify polling places where the electors were mainly black persons and where he alleged wrong doing by poll officers, in addition to eleven such polling places identified in his amended petition, and by the Trial Judge not allowing plaintiff's witnesses present in the courtroom to testify as to such wrong doing, the right to hold office being, in effect, a property right?

The said federal question, insofar as the liberal right the law gives a party to amend his pleadings to conform with available evidence is concerned, first arose during the proceedings as to the Motion of the defendant to Dismiss when plaintiff made repeated requests to be allowed to

amend in such manner as to identify said additional polling ~~places~~ and the Trial Judge made statement he thought he had a duty to allow the plaintiff to so amend, but did not actually allow him that privilege. That federal question arose again when the Court of Appeals of Georgia ignored completely in its opinion delivered in connection with its judgment of affirmance the issue raised as to his right to amend in No. 4 of plaintiff's Enumeration of Errors which had been filed in that Court of Appeals appears on page 95 of the Record and page xxvi of Appendix hereto, and that question arose again when the Supreme Court of Georgia denied the petition for certiorari.

The first request made by the plaintiff during said September 20, 1968 hearing on defendant's Motion to Dismiss appears in the official reporter's transcript of those proceedings on page 52 of the Record and in part of that transcript on page xiv of the Appendix attached hereto. It is as follows:

"BY MR. LOWE: I am going to state now, Your Honor, I am going to request permission to amend to set out more precincts with particularity".

The large blue numbers in lower left corner of each page of the Record are the numbers that indicate in sequence the pages of the record, the smaller black number at top or bottom of each page indicating its number in the sequence or order in which it appears in a paper that is a part of the Record.

Plaintiff's second request to so amend appears in the transcript on page 67 of the Record and on pages xx and xxi of the

Appendix hereto which contains most of the transcript and reads:

"BY MR. LOWE: ******but again I do respectfully request I be permitted to amend. I can state this easily with particularity. I thought I had Plead my evicence too much, had overdone it".

The Court's comments as to that second request, plaintiff's first such request having been ignored by the Court, appear in the transcript on pages 67 and 68 of the Record:

"BY THE COURT: After filing any petition, cross action or answer may be amended by leave of the Court other relevant facts. Am I not bound to permit him to amend?"

"* * * * * * * * *

"BY THE COURT: The other decisions say I can provide liberal rules".

Plaintiff again indicated his desire to so amend, as shown in the transcript on pages 69 and 70 of the Record and on pagesxxi and xxii of Appendix hereto:

"BY MR. LOWE: If I brought in all precincts and show more particularity -

"* * * * * * * * * * *

"BY MR. LOWE: It will mean more if I set it out and it is common knowledge the black vote is enough to swing an election and that allegation would take in every one".

The Court's comments as to said indicated desire of plaintiff to amend appear

in the transcript on pages 69, 71 of the Record and on pages xxii and xxiii of the Appendix hereto:

"BY THE COURT: I think under the code I am duty bound to give you an opportunity to amend

" * * * * * * * * * * *

"BY THE COURT: Well, go back to where it is subject to general demurrer or special demurrer, isn't that ground for special demurrer to make it more particular? We are speaking of his right to amend as set forth in that paragraph".

The said federal question, insofar as the Trial Judge not allowing many of plaintiff's witnesses present in the court-room to testify as to wrong doing by poll officers in the polling places in precincts where registered voters mainly black persons, arose in the said proceedings as shown in the transcript in the Record, and was raised again in No. 2 and 4 of plaintiff's Enumeration of Errors, which appear on page 95 of the Record and page xxvi of Appendix hereto.

The instance in which it was, in effect, raised in the proceedings appears as follows in the transcript on pages 59 and 60 of the Record and on page xvi of the Appendix to this petition, and occurred when plaintiff was examining Dr. James Tibbs, a colored pharmacist, at the hearing:

"Q. Do you have any general knowledge of any mal-conduct or fraud?"

"BY THE COURT: This is not in issue before the Court at this time. This is a Motion to Dismiss

* * * * * * * * * * *"

The Motion to Dismiss became considered as a Motion for Summary Judgment, but plaintiff's witnesses as to wrong doing in said 40 polling places were, in effect, prohibited by the Court's statement with respect to plaintiff's said question to Dr. Tibbs from testifying.

Petitioner repeats next the following federal questions he stated on page 17 hereof were raised for review as federal questions in said proceedings and the judgment rendered following them, the federal questions being closely related to questions presented in the last preceding paragraph on pages 16 and 17 hereof:

Where the allowing by the Trial Court of the Motion to Dismiss to become a Motion for Summary Judgment and the granting of Summary Judgment under the circumstances stated violations of the clause in the Fourteenth Amendment to the United States Constitution which forbids any State to "deprive any person of********property without due process of law", the right to become elected and hold office being a property right?

The Record discloses that no affidavit, deposition, answers to interrogatories, or admissions had been filed by either party before the proceedings on the Motion to Dismiss and the same Motion as one for Summary Judgment ended; that the only Motion filed by the defendant was the Motion to Dismiss (Record, p.13 and Appendix hereto, p. ix) for failure of the plaintiff "to state a claim upon which relief can be granted", the No. 2 Ground in that Motive, vixz, failure "to join an

indispensable party" having been withdrawn by the defendant near the end of the hearing, as shown in the transcript (Record, pp. 72,73 and Appendix to this petition, p. xxiv). The judgment of the Trial Court, granting a Motion to Dismiss and a Motion for Summary Judgment, and dismissing the petition, with prejudice, appears on page 25 of the Record and pages ix and x of the attached Appendix).

The complete transcript of the proceedings (Record p. 37) shows plaintiff, attorney pro se, never agreed, after he was for the first time served with a copy of the Motion to Dismiss after the proceedings had begun, for the hearing to proceed on the Motion to Dismiss as one for Summary Judgment and never waived any of the requirements set forth in paragraph (b) of Section 81A-112, "Defenses and Objections" of the Georgia Code as to the method of disposition of a Motion to Dismiss that has been allowed to become a Motion for Summary Judgment and never waived and of conditions and requirements as to the granting of a Motion for Summary Judgment stated in paragraph (c) of Sec. 81A-156, "Summary Judgment", of the Georgia Code. Reference is made in this connection to the said parts of Sec. 81A-112 (b) and to that part of Sec. 81A-156 (c) set out in the part of this petition having subtitle "Compliance with Subparagraph (d) of Rule 23", which begins on page 20 hereof, and to the quotation of said parts of said Section 81A-112 (b) and 81A-156 (c) on page 16 hereof. Those parts are made by reference parts of this of this division of the petition. Reference is also made to pages 10-17, inclusive, hereof whereon appeal the statements of the circumstances under which the Motion to Dismiss was treated

and disposed of as a Motion to Dismiss in violation of said provisions in said two sections of Title 81A of the Georgia Code.

In view of the quotation in the first subparagraph of part 3 of the opinion in the case of the Court of Appeals of Georgia of the last paragraph in paragraph 6 of the amended and substituted petition and the statements made in the 4th and 5th subparagraphs of said part 3 of that opinion, which indicate an attitude of that Court, there was raised the federal question: Whether or not plaintiff , in said last subparagraph of paragraph 6 of his amended pleading drew the color line, failed to comply with the principle "one person, one vote", or showed disregard of the provision in the Fourteenth Amendment to the United States Constitution reading:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;* * * * nor deny to any person within its jurisdiction the equal protection of the laws"; or whether or not instead his use in said subparagraph of such terms in referring to polling places "where the electors were mainly black persons" and "where the electors were mainly of the Black Race" amounted merely to identification of a certain kind of polling places.

Said last subparagraph of the plaintiff's amended pleading appears on page 18 of the Record and page v of the Appendix attached to this petition and reads in part:

"Such malconduct, fraud and/or irregularities by poll officers at the polling places

hereinbefore stated, where the electors were mainly black persons, and at almost every other polling place in the 5th District where the electors were mainly of the Black Race* * * * * * * * * * * * were sufficient to change the result of the Primary as to that office or place it in doubt* * * * * * * *".

The said first, fourth and fifth subparagraphs of part 3 of the opinion delivered on the appeal in that Court of Appeals appear on pages 109, 111 and 112 of the Record and xxxiv, xxxv, and xxxvi of the Appendix attached to this petition.

The first sentence in said fourth subparagraph is: "The color line has no proper place in judicial administration"; and the first line in the said fifth subparagraph is: "The law does not know race or color in the matter of eligibility to vote".

Said federal question was, in effect, raised for the first time as to that subparagraph of the amended pleading in part 3 of that opinion.

Compliance with Subparagraph (h) of Rule 23-Argument.

Number 1 of appellant's Enumeration of Errors, which were filed with the Clerk of the Court of Appeals of Georgia at the time of filing appellant's first brief, is quoted in part next:

"1. The Court erred in granting that part of the motion of the defendant to dismiss the complaint of plaintiff for failure to state a claim upon which relief could be granted,since plaintiff pled both in his original complaint and his amended and substituted complaint ultimate facts to be established by proof, which ultimate facts set out a claim, under applicable provisions of Chapter 34-17, "Contested Primaries and Elections", upon which relief could be granted and pled some but not all of the details of evidentiary facts involved,* * * * *".

The chief contention made by counsel for the defendant at the hearing was that plaintiff did not plead with particularity, in that he did not identify enough of the polling places in precincts where black registered voters predominated in which the total votes cast for the two candidates were sufficient to change or cast in doubt the result. However, in the last subparagraph of paragraph 6 of his final pleading, the plaintiff did allege an ultimate fact that "Such malconduct, fraud and/or irregularities at the polling places hereinbefore stated, where the electors were mainly black persons, and at almost every other polling place in the 5th District where the electors mainly of the Black Race* * * * * * * * were sufficient to change the result of

the Primary as to that office or place it in doubt* * * *".

Plaintiff distinguished and made some identification of the polling places to which he referred in addition to the specifically identified eleven when he referred to them as polling place "where the electors were mainly of the Black Race" and sufficiently put the defendant on notice thereby as to the additional polling places to which he referred, the total of forty of such polling places being only about one-fourth of the total polling places in the Fifth District. In support of this contention, the following citation of a decision in a contest of an election for a sheriff is given:

It is not required that detailed evidentiary facts be pleaded in a petition; the ultimate facts to be established by proof are sufficient. Bush v. Johnson, 111 Ga. App. 702.

It appears that a serious error was committed by the Trial Judge in failing to allow plaintiff to amend his pleading in such manner as to identify the other 29 polling places "where the electors were mainly of the Black Race", particularly when, as heretofore stated, the transcript of the proceedings at the said hearing shows he stated he thought he had a duty to allow the plaintiff to amend. It is generally recognized that the law is liberal with respect to the conditions under which a party should be allowed to amend. It is has been hereinbefore shown that said "Voting Summary" was stipulated in evidence by counsel for the defendant during the hearing and that the opinion of the Court of Appeals indicated that the returns as to that

office in the primary and the fact there are 155 precincts in the Fifth District are judicially recognized. The "Voting Summary" is such a return. A copy of it and said opinion are included in the Appendix which is at the end of the petition. The Court of Appeals also seriously erred in ignoring in its opinion the failure of the Trial Judge to grant any of the requests of plaintiff to be allowed to so amend, particularly when plaintiff in two of the Errors Enumerated in the Enumeration of Errors he filed raised an issue about the failure to allow him to so amend.

Appellant also raised issues in two of the Errors stated in his Enumeration of Errors filed in the Court of Appeals as to the circumstances under which the Motion to Dismiss was granted also as a Motion for Summary Judgment. He has set out these circumstances hereinbefore before. It is now pointed out that Sec. 81A-112 (b) of the Georgia Code requires, in effect, that when a Motion to Dismiss is treated as a Motion for Summary Judgment, it must be "disposed of as provided in Section 81A-156, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Section 81A-156".

It is crystal clear that the Motion was not disposed of in said manner. It appears that the fact it was not so disposed of was a violation of the "due process" clause of the 14th Amendment, as was also the failure of the Trial Judge to allow plaintiff to amend.

In this connection, paragraph (c) of Sec. 81A-156 of the Georgia Code is quoted in part next:

"(c) Motion and proceedings thereon. The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of fact and that the moving party is entitled to a judgment as a matter of law*********"

There is no authorization for use of testimony adduced at a hearing on such a motion, but that is all the evidence that was adduced at said hearing. No affidavits, depositions, answers to interrogatories, or admissions had been filed by either party. The motion had not been served, as required, at least 30 days in advance of the hearing date.

In conjunction with the foregoing, the following citation is given:

Motion to dismiss for failure to state a claim upon which relief could be granted could not be treated as a motion for summary judgmen t based on extra-pleading matter, if alleged extra-pleading matter consisted only of a summary of exhibits filed in another proceeding, since extra-pleading matter must be by "deposition" "admission", or "affidavit"

Sardo v. McGrath, 90 App.D. C.195, 196 F. 2d 20.

The extreme press of time with respect to having this petition printed in required copies and shipped timely by airplane prevents petition giving more argument he would like to present.

WHEREFORE, it is respectfully submitted that the foregoing Petition for Certiorari should be granted.

Respectfully submitted,

Charles E. Muskett

COUNTY OF FULTON, GEORGIA

I hereby certify that I have, in compliance with Rule 33 of this Court, on this date, May 12, 1969, served a copy of the foregoing petition for certiorari and the hereto attached Appendix upon counsel who were of record for said Respondent in Certiorari in this case in State Courts of Georgia by depositing a copy in an envelope, addressed to Alston, Miller and Gaines, Attorneys at Law, at their offices, Citizens and Southern National Bank Building, Atlanta, Georgia, 30303, with sufficient postage attached to the envelope to insure its delivery.

Duly sworn and subscribed to before me, this 12th day of May, 1969.

WYMAN C. LOWE

NOTARY PUBLIC

Mable W. Bithell
My Com. Exp. 11-7-1971

Appendix

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

WYMAN C. LOWE :
:
vs. : NO. B-40214
:
CHARLES LONGSTREET WELTNER:

Now comes WYMAN C. LOWE, plaintiff in the above styled cause, with leave of the Court had and obtained, and files this his Amended Petition, in lieu of and in substitution for his previously filed petition, striking in this Amended Petition a defendant named in the original petition, WILLIAM C. GRAHAM, Supervisor of Elections for Fulton County, his Amended Petition being as follows:

AMENDED AND SUBSTITUTED PETITION

WYMAN C. LOWE brings this his petition against CHARLES LONGSTREET WELTNER, contesting therein the nomination of said Mr. Weltner for Representative for the Fifth Congressional District of Georgia in the United States House of Representatives that occurred in the September 11, 1968 Democratic Primary, and for cause of complaint alleges:

1. Each of said defendants is a resident of the Fifth Congressional District, which lies within Fulton County, Georgia, and is subject to the jurisdiction of this Honorable Court.

2. Contestant, Wyman C. Lowe, institutes this contest by virtue of his having been a duly qualified candidate for nomination for the office stated in the Democratic Primary.

3. Contestant desires to contest herein the result of said Primary with respect to the purported nomination of said Mr. Weltner for said office.

4. Charles Longstreet Weltner and this contestant were the only candidates for nomination to said office in that Primary.

5. The name of the defendant, as it appeared on the ballot, is as indicated in the introductory paragraph hereof.

6. The result of said Primary, as officially declared, to-wit, that said Mr. Weltner is the nominee of the Democratic Party of Georgia for the office stated, is contested herein under the provisions of Chapter 34-17 of Title 34 of the Code of Georgia, as amended through the 1968 session of the Legislature, that Title being known as the Election Code of Georgia, on grounds set forth in Section 34-1703 (a) and (b), and also under Section 34-1706 (d) of said Election Code. With respect to the grounds set forth in Section 34-1703 (a) as to primary officials, the following is averred:

(a) There were malconduct, fraud, and/or irregularities on September 11, 1968, date of the Democratic Primary Election, by poll officers at the polling place within the Grove Park Elementary School on the Fifth District, in that many electors (qualified registered voters) were allowed by the poll officers to have a certain kind of campaign card of Mr. Weltner in hand, plainly visible to the poll officers, when the electors entered the polling place and to retain it until after voting. The kind of card

to which reference is made was printed on only one side, was about 4 by 6 inches in size, had at its top the title "OFFICAL VOTERS GUIDE", contained, among other things, statement that the Fulton County Democratic Club endorses Charles Weltner for U. S. Congress. One of said kinds of cards, a true copy of the kind referred to, is attached hereto. There were further malconduct, fraud, and/or irregularities by said poll officers on that day in that they allowed three of more of said cards to be placed separately on top of a table and remain in plain view of electors when each picked up a printed form slip from the table which each elector was required to sign before voting; in that the poll officers allowed a campaign worker for Mr. Weltner to remain part of said day at distance of about 15 feet from the western edge of the building in which the polling place located, or about 75 feet from the polling place, in a position in the line of walking of electors to that polling place and to hand to each passing elector one of said cards, without any of the polling officers trying to prevent such distribution of the cards, and they allowed each such elector to go, with the card in hand, inside the polling place and some of the electors to go inside a voting booth with the card in hand; in that none of the poll officers tried to cause the arrest of the man so distributing the cards. The term "poll officers", as defined in said Code, means the chief manager, assistant managers and clerks.

(b) There were malconduct, fraud, and/or irregularities on that day at the polling place located within the Reading Clinic at Atlanta University in the 5th District by the polling officers in that they allowed a such

campaign card for Mr. Weltner to be posted by a worker for Mr. Weltner and to remain on the outside facing of a door leading into the polling place in such position that it was impossible to escape attention of electors entering the polling place; in that campaign workers for Mr. Weltner permitted to distribute such cards inside to electors inside polling place.

(c) There were malconduct, fraud, and/or irregularities by poll officers at polling places within the Fifth District on that day in the following instances:

(1) A campaign worker for Mr. Weltner was permitted to stand on the steps in front of a polling place in the Rockdale School on Perry Boulevard, and within 25 feet of the polling place, and to hand out such cards to electors as they entered the polling place to vote;

(2) Another such campaign worker was allowed to pass out such cards to electors at about where they entered the polling place at Scotts Crossing on Hollywood to vote; another such worker and young boys working for Mr. Weltner were allowed by poll officers to hand to electors standing in line within 50 feet from a polling place in a school building on Hill Street such cards and to state Mr. Weltner was the only person running for Congress, "vote for him"; a college student campaign worker for Mr. Weltner and children working for him were not interfered with by poll officers while they handed cards to electors standing inside the English Avenue School Building polling place.

(3) Such cards were handed by campaign workers for Mr. Weltner within 50 feet of the polling place at Morris Brown College polling place to electors without interference by poll officers, also within 50 feet of and inside the polling place at the Playland Housing Project such Weltner workers were not disturbed by poll officers while they handed out such cards to electors; similarly campaign workers for Mr. Weltner were permitted by poll officers to hand such cards to electors within and not more than 50 feet from the polling place in a fire station on Hollywood Road.

Such malconduct, fraud and/or irregularities by poll officers at the polling places hereinbefore stated, where the electors were mainly black persons, and at almost every other polling place in the 5th District where the electors were mainly of the Black Race, in permitting such distribution of the cards were sufficient to change the result of the Primary as to that office or place it in doubt, considering what was the approximate percentage of the total votes of black electors cast as to the total of all votes cast for Mr. Weltner and Mr. Lowe together in the 5th District.

7. Illegal votes were received and legal votes rejected at the polls within the 5th district on that day for that office sufficient to change the result of the Primary or to leave it in doubt.

8. Inside a polling place in the Georgia Avenue School Building, a young black campaign worker for Mr. Weltner was permitted by poll officers there to accompany for many hours electors singly into one or the other of the Democratic voting booths on the pretext

stated by him that he wished to show each how to use a Votomatic, then allowed to open the leaves of the Votomatic in the booth to the page on which appeared names of Mr. Weltner and Mr. Lowe and to punch a hole at Position 41 as a vote for Mr. Weltner. Such constituted malconduct, fraud and/or irregularity by poll officers, which helped to change the result or place it in doubt.

9. In the polling place at Washington High School Building and in other polling places on display where the electors were mainly black persons, the sample ballot on display to electors contained the name of Mr. Weltner as a candidate for Congress, but not the name of Mr. Lowe as such candidate.

10. A section of said Code provides that the state executive committee of any political party may adopt and promulgate rules governing any primary of that party. Such Rules of the State Democratic Executive Committee of Georgia then effective provided that any candidate for an office in a Democratic Primary would be allowed representation among poll officers, including clerks and assistant managers, insofar as practicable. A list of fifteen names of persons qualified to be poll officers were submitted to a proper election party official by an agent for Mr. Lowe for use at the polls on said day, but the entire list was rejected or none on it used that day. Irregularities and fraud resulted in many polling places in the black areas for which such suggested poll officers were intended because of their not being assigned to such duty, many poll officers whose names suggested by or for Mr. Weltner having been assigned to such duty.

10. The date of official declaration of said result was September 16, 1968. Contestant seeks to have said nomination declared null and void.

WHEREFORE, petitioner prays:

(a) That process issue, as by law required.

(b) That a judge, as required by law, be obtained for trial of this case, and the trial be set for a date as early as practicable under the circumstances existing.

(c) That said Mr. Weltner be declared not to be the lawful nominee of said Party for the office stated and another Primary be directed to be held to determine the lawful nominee.

/S/ WYMAN C. LOWE
WYMAN C. LOWE
Contestant
Attorney pro se

701 Carnetie Bldg.
Atlanta, Georgia 30303

COUNTY OF FULTON
STATE OF GEORGIA

Personally appeared before me, an officer authorized by law to administer oaths, WYMAN C. LOWE, who being sworn on oath, deposes and says that the facts alleged herein are true, that according to the best of his knowledge and belief the contested result of the primary is illegal and the return thereof incorrect, and this petition to contest the same is made in good faith.

Duly sworn and subscribed to before me, this 19th day of Sept. 1968. Peggy Russell, Notary Public, Notary Public, Fulton County, Georgia, My Commission Expires July 28,1970.

/S/ Wyman C. Lowe
Wyman C. Lowe

Foregoing amendment allowed and is hereby filed.

Sept. 19, 1968 /S/ Hubert C. Morgan
Filed in office Judge Sup. Court St.Mt.
Sep. 20, 1968 Circuit
W.M. Callaway, Deputy Clerk Superior Court, Fulton County Georgia

CERTIFICATE OF SERVICE

I hereby certify that I did at about 8:15 A.M., Sept. 19, 1968, serve a copy of the foregoing Amended and Substituted Petition upon Mr. Charles L. Weltner by personally myself delivering a copy in an envelope addressed to him to his residence, 33 Walker Terrace, NE, Atlanta, Ga., and pushing the envelope and contents under the front door while Mr. Weltner was at his said residence.

/S/ WYMAN C. LOWE
WYMAN C. LOWE

CAPTION OMITTED

O R D E R

The above styled case is hereby set for trial at 10 A.M. Sept. 20, 1968, at the Fulton County Courthouse, Room 705, before the undersigned. Let this order be served on defendant instanter.

This Sept. 19, 1968.

Filed in office /S/ Hubert C. Morgan
Sept. 20, 1968 Judge Sup. Court DeKalb Co.
W.M. Callaway
Deputy Clerk Superior Court
Fulton County, Georgia

CAPTION OMITTED

CO-DEFENDANT'S MOTION TO DISMISS

Comes now CHARLES L. WELTNER, co-defendant in the above-styled cause, and moves the Court, pursuant to the provisions of Georgia Code Annotated §81A-112(b) (6) and (7), to dismiss the above-styled cause on the grounds that:

1. Plaintiff has failed to state a claim upon which relief can be granted; and

2. Plaintiff has failed to join an indispensable party.

This 19th day of September, 1968.

Alston, Miller & Gaines
12th Fl. C & S
National Bank Bldg.
Atlanta, Georgia 30303
524-3241

/S/ ROBERT W. MILLER
ROBERT W. MILLER,
Attorney for Co-Defendant CHARLES L. WELTNER

Filed in office, Sep. 19, 1968
Ruby H. Ward, Deputy Clerk Superior Court
Fulton County Georgia

CAPTION OMITTED

O R D E R

The within and foregoing matter having come on for trial by agreement of the parties, and the defendant having made a Motion to Dismiss the complaint for failure to state a claim upon which relief could be granted and a Motion for Summary Judgment; and after the citation of authority, argument of counsel, hearing of evidence, and consideration by the Court, it is hereby ordered and adjudged that defendant's motions are

granted, and the plaintiff's complaint is hereby dismissed with prejudice and judgment is granted to defendant, costs being cast upon the plaintiff.

This 20th day of September, 1968.

Filed in office
Sep. 24, 1968
R. L. Lawson
Deputy Clerk
Superior Court
Fulton County
Georgia

/S/ Hubert C. Morgan
Hubert C. Morgan
JUDGE, SUPERIOR COURT OF FULTON COUNTY (Sitting by designation of Governor Lester G. Maddox)

CAPTION OMITTED

HEARING BEFORE THE HONORABLE HUBERT C. MORGAN, PRESIDING IN ATLANTA JUDICIAL CIRCUIT, SEPTEMBER 20, 1968

APPEARANCES OF COUNSEL:

For the Plaintiff: WYMAN C. LOWE, Esq. Pro se.
For the Defendant: ROBERT MILLER and RONALD REID, Esqs.

BY THE COURT: I call the case of Wyman C. Lowe versus Charles L. Weltner, No. B-40214.
* * * * * * * * * * * *

BY MR. LOWE: Are you willing to stipulate any copy Mr. Powell furnished as the summary of voting by precincts and also any official declaration of the results produced by either of them as purported official declaration that it is what was officially declared?

BY MR. MILLER: Your honor, in view of the fact that Mr. Sheats states the Democratic Party took the figures by Mr. Powell's office and read them and accepted them as fact and

put their certification on top of them, we will stipulate these are the figures certified to by the Democratic Party.

BY THE COURT: We have a motion to dismiss. Are you ready to respond?

BY MR. LOWE: I have not been served with a copy of it, Your Honor. I would like to look at it first.

BY MR. MILLER: Your Honor, a copy was duly filed but in view of the time problem we have in the case---

* * * * * * * * * * *

BY THE COURT: Before we get any further, you have proposed to submit certain evidence in support of your motion to dismiss.

BY MR. MILLER: Yes, sir.

BY THE COURT: Let me get that evidence now.

BY MR. MILLER: We call Mr. William J. Graham, Election Supervisor, Fulton County.

* * * * * * * * * * *

WILLIAM J. GRAHAM, being first duly sworn was called as a witness by the defendant and testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q. Again trying to be brief, briefly state -- if you will follow in the copy of the amended petition, Your Honor, -- the first polling place mentioned in Paragraph 6-A is Grove Park Elementary School. Can you tell us whether or not this is District 3-AB?

A. Yes, that is 3-AB.

Q. And what was the vote there?

A. It was Lowe 35, Weltner 643.
Q. I believe the second voting place mentioned is at the bottom of that same page; a Clinic at Atlanta University. Is that in 3-H?
A. Precinct 3-H. 43 for Lowe. 867 Weltner.
Q. I believe the next voting place mentioned is the Rockdale School.
A. That should be the Archer School.
Q. That is the Archer School and that is 3-AG, is that not correct?
A. That's right.
Q. What was the vote there?
A. Lowe 13, Weltner 316.
Q. Scotts Crossing, 6-C-2 of the petition.
A. Yes, sir.
Q. Is that in 3-V?
A. That is Scott Elementary School.
Q. What is the vote?
A. Lowe 25, Weltner 272.
* * * * * * * * * * *

Q. I believe the next place is English Avenue School building. Are there two school buildings, Primary School?
A. 3-AI, English Avenue Primary is English Avenue School.
Q. What was it?
A. 3-AI was 51 Lowe, 556 Weltner. 3-E, 59 Lowe, 474 Weltner.
Q. The next place mentioned is Morris Brown College, is that 3-Z?
A. 3-Z.
Q. What was the vote?
A. 20 Lowe, 235 Weltner.
Q. The next place mentioned is called Playland Housing Project, is that actually Egan?
A. Yes 3-S, 39 Lowe, 741 Weltner.

BY THE COURT: Hollywood Road.

A. That's right, Station 22.
Q. What was the vote?
A. Lowe 40, Weltner 332.

Q. The next place mentioned in Paragraph 8 is Georgia Avenue School building, is that 1-C?
A. Yes, 1-C.
Q. What was the vote?
A. 14 Lowe, 418 Weltner.
Q. And Paragraph 9, I believe is the last location, 7-D, is it Washington High School?
A. That's right.
Q. And the vote?
A. 134 Lowe, 77 Weltner.
Q. Do you have that totaled up?
A. Yes, 473 votes for lowe and 4,941 votes for Weltner.

BY MR. MILLER: I believe there are no more places listed with particularity as required by the Civil Practice Act, Your Honor.

BY THE COURT: We must now hear the total vote. What was the total vote? How many total votes?
A. 27,882 votes for Lowe* * * *For Weltner, it is 49,973
* * * * * * * * * * *

CROSS - EXAMINATION

BY MR. LOWE:
Q. Mr. Graham, do you know what per cent of the registered persons are white or black persons?
A. Which precinct?
Q. County-wide, if you have it, but the Fifth District if you don't have County-wide.
A. I don't have that County-wide. I just have the summary of votes County-wide.
Q. Do you have any way of knowing what per cent of the votes cast in the fifth District for Mr. Weltner and me together on September 11th were black votes, do you have that broken down?

BY MR. REID: I want to object to Mr. Lowe's question. I think the Court realizes the

only allegations in this petition that stand subject to this Motion to Dismiss are those which were stated with particularity, those precincts which were numbered. The others are not involved in this case.

BY THE COURT: Until we make a ruling on the last part of Paragraph 6 I will permit him to ask that question.

BY MR. LOWE: I am going to state now, Your Honor, I am going to request permission to amend to set out more precincts with particularity.

* * * * * * * * * * *

BY THE COURT: May I inquire, the language used in this last paragraph and we have not ruled on it, almost every other precinct where electors of the black race -- are there other precincts where there is a preponderance of black over white?

A. I haven't reviewed them.

BY THE COURT: Do you happen to know?

BY MR. MILLER: No, I do not, Your Honor, I would submit that again is not under the Civil Practice Act.

BY THE COURT: Even if it were to be admitted as a correct paragraph I don't know whether it would include other precincts or not.

BY MR. LOWE:
Q. What again did you say are the total registered Negro voters and what per cent of the total registration is that?
A. What precinct?
Q. I am talking about the whole Fifth District, Fulton County.
A. I don't have the full ---
Q. Isn't it somewhere between 45 and 50 per cent of the whole total?

A. The Registrar has the total for the whole County but they are not maintained by Congressional Districts.
* * * * * * * * * * *

BY THE COURT: Do you have any further testimony to submit in behalf of the Motion?

BY MR. MILLER: No, Your Honor, not with regard to the precincts specifically named.

BY THE COURT: Do you have anything to offer in the way of opposition to the Motion?

BY MR. LOWE: Yes, sir.

JAMES TIBBS, being first duly sworn, was called as a witness by the plaintiff and testified as follows:

DIRECT EXAMINATION

BY MR. LOWE:
Q. What is your occupation?
A. Pharmacist.
* * * * * * * * * * *

BY MR. LOWE: In that connection I do have another witness, Mr. Powell, we do have records that show the total registration.

BY THE COURT: I mean do you have any further questions of this witness?

Q. Do you have any -- have you glanced over the allegations in this particular petition, Dr. Tibbs?
A. I heard most of it this morning and I have heard you mention it, yes, sir.
Q. The precincts that were referred to?
A. Are black precincts.
* * * * * * * * * * *

BY MR. LOWE: He cannot state his general opinion, in his years of knowledge his

opinion of it?

BY THE COURT: I will be glad to hear anything admissible from him.

Q. Do you have any general knowledge of any mal-conduct or fraud?

BY THE COURT: This is not in issue before the Court at this time. This is a Motion to Dismiss. If admitted it still will not effect the result.

BY MR. LOWE: Anything showing in the other precincts, may I ask Your Honor to inquire of that, that there was a sufficient number of registered voters in the other precincts not named but referred to in the broad allegation and almost every other precinct, I am permitted to establish records or otherwise as to the additional number of colored voters involved over and above those twelve as a means of showing all of them totaled affected the precinct. I am permitted to do that, am I not?

BY THE COURT: * * * * Even if we go into that matter we can't go into it on the basis of this information.

Q. What knowledge on the subject do you have, Dr. Tibbs?
A. I have records, Your Honor, that were obtained from tabulation from the records of the Fulton County Congressional race this year and I ran an analysis of these records.
* * * * * * * * * * *

BY THE COURT: Where are the records?

BY MR. LOWE: Mr. Graham and Mr. Powell have a summary of voting by precinct which was the total number of registered white and colored votes in each precinct and the

total registration. Now the precincts that are named there, that I named in my petition would have to be checked off on that list.

BY THE COURT: You are talking about the total number of registered voters?

BY MR. LOWE: Yes, I want to show the total number of registered black voters in the other precincts not specifically named.
* * * * * * * * * * *

BY THE COURT: Well, let's have him on the witness stand.

BY MR. LOWE: But after I have done that there will have to be an analysis made that Dr. Tibbs has done in advance.

(Witness excused.)

WILLIAM J. GRAHAM, having previously been duly sworn was recalled to the witness stand and testified as follows:

RECROSS EXAMINATION

BY MR. LOWE:
Q. Will you turn to the Fifth District that we were talking about awhile ago. I have understood the attorney has stipulated with me in the beginning to the effect that this is a similar record showing the summaries of voters by precincts, registered voters and as to race, black and white.

BY MR. MILLER: I believe under the law, since it is the official government record in and of itself it is a valid record. I stipulated that the certification of the nominee which certification was issued by the Fulton County Executive Committee was based on these records and that the Executive

Committee's records were in fact these records. That is what I have stipulated.

BY MR. LOWE: I think on second thought, sir, I am going to have to place Mr. Powell up first and this gentleman up later.

(Witness excused.)

BY MR. LOWE: I want Mr. Powell, the Assistant Director of Data Processing in Fulton County.

CHARLES R. POWELL, being first duly sworn, was called as a witness by the plaintiff and testified as follows:

DIRECT EXAMINATION

BY MR. LOWE:
Q. What is your name and title?
A. Charles R. Powell, Assistant Director, Data Processing, Fulton County.
Q. As such, the Data Processing Office's function in a Primary Election is what, generally.
A. A Primary Election?
Q. A Primary or General Election.
A. Primarily we function to count the ballots.
Q. Do you also compile certain other data such as the total registered voters of the date of election, the total as to precinct, the total registered in a precinct, the total colored voters and total white voters, what per cent of the two that voted in the precinct and what per cent that is of the total registered, and again, do you compile data that breaks down into each precinct the number of white and black voters when you show the total registration in that precinct, do you compile that data?
* * * * * * *
A. Yes.
Q. Do you have such a compilation of data before you now, that is for the Fifth District?

BY THE COURT: Please tell us what you are driving at.

BY MR. LOWE: I am getting down to state we do have a total registration.

BY THE COURT: Broken down by black and white races, precinct by precinct?

A. I am sorry, Your Honor, I do not have the total vote cast on the date of election by white or Negro.

BY THE COURT: Do you have it by precinct?

A. The total voted?

BY THE COURT: No, the total number of Negro voters, white voters cast on that date, total number of votes for each precinct, do you have it by precinct?

A. No, sir, I cannot differentiate between white and Negro votes cast.

Q. But you do have a total vote cast that day?
A. Yes.
Q. And you have in each precinct the number of registered voters white or Negro.

BY THE COURT: I am not interested in that. If you have information as to how many white or black votes were cast that might cast upon the paragraph as it remained in there. It might not otherwise.

BY MR. LOWE: He doesn't have that figure but would Your Honor care to look at the total registered in the precinct, the total white and total black by precinct.

BY THE COURT: Yes.

Q. And the total votes cast but no way to

divide that?
A. Of course not, this is a secret ballot.
Q. I understand you do know in advance.

BY THE COURT: I didn't mean who they voted for, the white and black people voting in each precinct.

A. No, sir.
* * * * * * * * * * *

Q. Again, do you know what per cent on the date of this election, roughly what per cent within one or two per cent of the total registrants were black registered voters?
A. Black registered voters, those that cast ballots?
Q. No, sir, what per cent of the total registration for the Fifth District were black voters or what per cent of the registered voters for Fulton County were black voters?

BY THE COURT: I don't really care to hear it or want to know it. It is a question, here you have made an allegation, you say that where the electors were mainly black persons and almost every other polling place in the Fifth District, it doesn't include other precincts where the majority of black people vote.* * *

BY MR. LOWE: At the same time it wouldn't apply to his motion.

BY THE COURT: If there were only another five other precincts of people voting, black and white, you could take the votes and subtract them from this, from the number of Mr. Weltner's and if his vote is more than yours then the matter is at an end.
* * * * * * * * * * *

BY MR. LOWE: * * *but again I do respectfully request I be permitted to amend. I can state this easily with particularity.

I thought I had plead my evidence too much, had overdone it.

BY THE COURT: After filing any petition, cross action or answer, may be amended by leave of the Court other relevant facts. Am I not bound to permit him to amend?

BY MR. MILLER: I believe you can let him amend in your discretion.

BY THE COURT: The other decisions say I can provide liberal rules.

BY MR. MILLER: The proceeding today has actually turned into a Motion for Summary Judgment. I thought it would be resolved in a mathematical problem, the Court should not allow him to amend because it was also clear from what we heard today he can't state a claim upon which relief can be granted even after we get their tabulations, he is still almost 20,000 votes short of Mr. Weltner.

BY THE COURT: From that mathematical standpoint I doubt he could show any change in results based on the allegation but I have no evidence to sustain that.

BY: MR. LOWE: In explanation as to that difference, if I got one vote more than half of that, it would probably have shown me the winner because of that 22,000 if he got 11,000 less, those people voted, that would have meant the others voted for me. It wouldn't have to be 22,000 difference, it would have to be more than half.

BY THE COURT: No, the Code Section provides you throw those out. If you throw out those votes in those precincts and he still has more votes than you do, then it is over.

BY MR. LOWE: If I brought in all precincts and show more particularity ---

BY THE COURT: You say almost all those which are mainly black which shows nothing.

BY MR. LOWE: It will mean more if I set it out and it is common knowledge the black vote is enough to swing an election and that allegation would take in every one.

BY THE COURT: I think under the code I am duty bound to give you an opportunity to amend.

BY MR. MILLER: First, I agree you have discretion to allow him to amend. I believe we have seen enough here today that the court in good discretion and good conscience could refuse the amendment, and secondly, I would like to move for an adjournment until 2:00 o'clock for the following reason. I believe that with good and admissible evidence, we may be able to show that mathematically the last paragraph of Paragraph 6 does not state a claim upon which relief can be granted.

BY THE COURT: I have not expressed an opinion but I don't think the paragraph is a valid paragraph but I have to make that determination. If I strike it then the matter is at an end now unless your argument on the question of the last paragraph, six, as to whether it should or should not be stricken ---

BY MR. LOWE: I thought I had overdone with particularity naming all these polling precincts. I can give the others. I thought I had been too detailed, Your Honor.

BY THE COURT: May I ask another question. The Uniform Practice and Pleading Act, was it in effect or not in effect at the time this Uniform Code was amended to set up these particular grounds of the contest. Are we bound by the Pleading and Practice Act or the Code?

BY MR. MILLER: I believe we are bound by the Civil Practice Act.

BY THE COURT: Well, go back to where it is subject to general demurrer or special demurrer, isn't that ground for special demurrer to make it more particular. We are speaking of his right to amend as set forth in the particular paragraph.

BY MR. REID: I would like to repeat something Mr. Miller said before. The whole election code is designed for speed and there is no opportunity for discovery.

BY THE COURT: It says in 112 Appeals, "--additional election be avoided unless--placed in doubt or result to be different." Of course, that is the basis of this motion. It was meant they intended to bring a final halt to the election once he has been held and unless there has been such irregularities that would change the result -- when did the Pleading and Practice Act go into effect?

BY MR. REID: 1967.

BY THE COURT: When was the election code amended, I don't have it.

BY MR. REID: I don't have it here.

BY MR. LOWE: We are allowed more latitude as to form of pleading, such as whether or not I set out details to every precinct. All these numerous precincts, would there be necessity of setting them out? We have got some of the large precincts set out. That would go to whether or not we set out in detail. It takes a lengthy petition to detail it in particular.

BY THE COURT: This matter must be brought to a head and reach a judicial decision and it will not be final until and unless

appealed and resolved by the Appellate Court. Are you willing to remove your contention with respect to the service on the Secretary of State?

BY MR. MILLER: Yes, sir.

BY THE COURT: If you remove that and strike it from the petition then I will strike the final Paragraph 6 of the plaintiff's petition and sustain your Motion to Dismiss.

BY MR. LOWE: Did you state, Your Honor, an amendment?

BY THE COURT: He has withdrawn that argument.

BY MR. LOWE: Did you allow me to amend?

BY THE COURT: I think in view of what we have had at this moment I will let it stand as is.

G E O R G I A:
FULTON COUNTY:

The foregoing transcript of the proceedings was taken before me as Official Court Reporter for the Superior Court and reduced to typewriting under my direction and supervision and I certify that it is a true and correct transcript of the proceedings.

This 17th day of October, 1968.

/S/ HELEN CLARK
HELEN CLARK
Court Reporter

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

WYMAN C. LOWE, Appellant,	:	
vs.	:	CASE NO. 44079
CHARLES L. WELTNER, Appellee	:	

ENUMERATION OF ERRORS

Comes now Wyman C. Lowe, appellant in the above styled appeal, and enumerates the following errors in connection with his appeal to this Court:

1. The Court erred in granting that part of the motion of the defendant to dismiss the complaint of Plaintiff for failure to state a claim upon which relief could be granted, since plaintiff pled both in his original complaint and his amended and substituted complaint ultimate facts to be established by proof, which ultimate facts set out a claim, under applicable provisions of Chapter 34-17, "Contested Primaries and Elections", upon which relief could be granted and pled some but not all of the details evidentiary facts involved, it appearing from statements by the Presiding Judge and counsel for the defendant made during the September 20, 1968 hearing that appear in the Court Reporters notes the said motion to dismiss was granted mainly for failure of Plaintiff to state address of each of many other polling places in the Fifth District in his pleadings, to which plaintiff referred generally as polling places where mainly black persons voted.

2. The Court erred in allowing the motion of the defendant to dismiss to be converted, in effect, into a motion for summary judgment, then allowing one or more witnesses of defendant to testify, and declining to allow many of plaintiff's witnesses then in the Court room to testify, and not allowing Dr. Tibbs, plaintiff's witness, to complete his testimony.

3. The Court erred in dismissing plaintiff's complaint and in not considering plaintiff's amended complaint in connection with the motion to dismiss, since the amended complaint was allowed and filed on the same date as the motion to dismiss and was served on that date.

4. The Court erred in not granting plaintiff's request for a recess to permit him time to amend his complaint or amended complaint in such manner as to indicate specifically the address of the additional polling places where he alleged mainly black persons voted and in not allowing him to so amend and then in not allowing him to have his witnesses present to testify as to malconduct, fraud or irregularities by poll officers, including clerks, at all the polling places where he alleged and was prepared to so prove mainly black persons voted.

5. The Court erred in not ruling whether or not the pleadings of the parties and all evidence adduced showed there was no genuine issue of fact, with respect to the motion for summary judgment, and in granting the motion for summary judgment under the conditions that the said transcript on file and the reporters notes show the motion was granted.

The main reason the Court of Appeals of Georgia, and not the Supreme Court of Georgia, has jurisdiction of this appeal is that this case is not such a case indicated in a paragraph in Article VI, having title "Jurisdiction of the Supreme Court", in said Constitution, of which the Supreme Court has jurisdiction; and a part of Section 2-3708 of Article VI of said Constitution reads:

"The Court of Appeals of Georgia shall have jurisdiction for the trial and correction of errors of law from the superior courts.....in all cases in which such jurisdiction has not been conferred by this Constitution upon the Supreme Court...., except that where a case is pending in the Court of Appeals and the Court of Appeals desires instruction from the Supreme Court....." This case does not appear to come within such an exception.

The original petition or complaint, the amended petition or complaint, the first ground of the motion of the defendant to dismiss, the brief (transcript) in narrative form of the evidence and proceedings, and the Order or Judgment of Presiding Judge Morgan rendered September 20, 1968, show that this Court has jurisdiction.

701 Carnegie Bldg., Atlanta, Ga. 30303

/S/ WYMAN C. LOWE
WYMAN C. LOWE
Appellant, Attorney pro se

Certificate of Service

I hereby certify that I have on this date, October 14, 1968, served a copy of the foregoing document upon Alston, Miller and Gaines, Attorneys of record for said Appellee by depositing in the U. S. mails a copy in an envelope properly addressed

to said law firm, Citizens and Southern National Bank Building, Atlanta, Georgia.

/S/ WYMAN C. LOWE
WYMAN C. LOWE

118 Ga. App. 635, 164 S.E. 2nd 919

44079. LOWE vs. WELTNER

WHITMAN, Judge. This is a contested election case by Wyman C. Lowe against Charles Longstreet Weltner involving Democratic Primary election held on September 11, 1968 for nomination for the office of Congressman in the United States House of Representatives for the 5th Congressional District of Georgia. It is before this court on an appeal by the contestant Lowe, plaintiff in the court below, and appellant here, from a judgment of the Honorable Hubert Morgan, Judge of the Superior Court of DeKalb County, Stone Mountain Judicial Circuit, presiding by appointment of Governor Lester G. Maddox in the Superior Court of Fulton County, Georgia, Atlanta Judicial Circuit. The Judgment rendered on September 20, 1968 in favor of Weltner is as follows:

The within and foregoing matter having come on for trial by agreement of the parties, and the defendant having made a Motion to Dismiss the Complaint for failure to state a claim upon which relief could be granted and a Motion for Summary Judgment; and after the citation of authority, argument of counsel, hearing of evidence, and consideration by the court, it is hereby ordered and adjudged that defendant's complaint is hereby dismissed with prejudice and judgment is granted to defendant, costs being cast

upon the plaintiff. (Emphasis supplied.) The appeal recites that "the transcript of the evidence and of the proceedings of September 20, 1968 is to be transmitted by the Clerk as a part of the record on appeal.

The record as transmitted to this court contains plaintiff's original petition filed in the lower court on September 16, 1968, and also plaintiff's substituted petition, verified September 19, 1968 and allowed and ordered filed on that date and filed September 20, 1968.

On September 19, 1968 Weltner as co-defendant moved the court in writing, pursuant to the provisions of Georgia Code Ann. § 81A-112(b), (6) and (7), to dismiss the cause on the grounds that: (1) Plaintiff has failed to state a claim upon which relief can be granted; and (2) plaintiff has failed to join an indispensable party. (It appeared on the hearing that the alleged indispensable party was the State's Elections Board, and the second ground of the motion was withdrawn or waived by the defendant.)

Judge Morgan, by order of date September 19, 1968, filed September 20, 1968 at the Fulton County Court House.

On the call of the case on September 20, 1968 there was before the court plaintiff's substituted petition; plaintiff's original petition being no longer before the court as a pleading, the substituted petition being filed in lieu of and in substitution for plaintiff's previously filed petition; and there was also before the court the defendant's motion to dismiss the above styled cause, the motion being entitled in the cause. In view of the fact that the second ground of the motion was

withdrawn, the motion proceeded on the first ground only.

The substituted petition sought to have Weltner's nomination in the Primary election declared null and void; that said Mr. Weltner be declared not to be lawful nominee of said party for the office stated and another Primary be directed to be held to determine the lawful nominee.

On the hearing the trial court announced to the parties: We have a motion to dismiss. Are you ready to respond? Whereupon Mr. Lowe responded: I am ready to proceed on the motion. Thereupon the court proceeded to hear arguments both by counsel for defendant Weltner and by Mr. Lowe; and counsel for Weltner having proposed to submit evidence in support of the motion to dismiss, the court proceeded to hear evidence from one William C. Graham, Election Supervisor of Fulton County, called as a witness by the defendant, with direct examination by cousel for defendant and by cross-examination by Lowe.

At the conclusion of the testimony by Graham one James Tibbs was called as a witness by plaintiff and examined by Mr. Lowe, and after further re-cross-examination of witness Graham by Mr. Lowe the court heard testimony of one Charles R. Powell, called as a witness by the plaintiff and examined by Lowe, the witness being Assistant Director, Data Processing, Fulton County.

On the hearing of the motion to dismiss there was no objection at any time either at the beginning of or during the hearing to the order of procedure, nor to the use of evidence by the testimony of the witnesses in connection with the hearing. Thus the motion to dismiss,

relating as it did to the substituted petition, and being so heard by the court and the parties, was and is to be treated as a motion for summary judgment and disposed of accordingly. Ann. Code §81A-112(b).

1. Plaintiff's substituted petition appears to be predicated as to grounds for contest on Ann. Code § 34-1703(a) and (b). Section 34-1703 (b) sets forth as a ground of contest when the defendant is ineligible for the nomination of office in dispute. Paragraph 7 of the substituted petition is that illegal votes were received or legal votes rejected at the polls in said district sufficient to change said result of place it in doubt. This is the language of Section 34-1703(c) of the Election Code. There is no evidence in the record to support a contest on either of the grounds as set forth in Section 34-1703(b) or Section 34-1703(c), and there is no enumeration of error or errors in respect of such grounds of contest or either of them.

2. Ann. Code § 34-1703(a) provides as a ground of contest malconduct, fraud or irregularity by any primary or election officials sufficient to change or place in doubt the result. In paragraph 6 of the substituted petition there is set forth in sub-paragraphs (a), (b) and (c) alleged malconduct, fraud and/or irregularities at certain named voting places relating to the display, distribution and use of campaign cards. In paragraph 9 of said petition it is alleged that at another certain polling place a sample ballot was on display to electors containing the name of Weltner as a candidate for Congress, but not the name of Lowe as such a candidate.

It was stipulated on the hearing by counsel for the parties that a written summary of the election returns in the election involved showing voting returns by precincts could be considered on the hearing, and the witness Graham was examined as to the total results and in respect of the results in certain named precincts. A copy of this document is not contained in the transcript of proceedings filed in this court on October 18, 1968, although matters of stipulation appear therein. This transcript is considered by this court as a part of the record in lieu and instead of the first transcript filed in this court on October 3, 1968, which on account of the illness of the court reporter who reported the case in the trial court, was prepared from memory and approved by the trial judge with understanding that additional or amended transcript be later filed. However, a copy of the document showing summary of total precinct returns is attached to a supplemental brief of appellant filed in this court on October 21, 1968 and shows a total of 155 voting precincts. Moreover, the court takes judicial notice of the total number of precincts and returns. 31 C.J. Sec. (Evidence), Sec. 51, page 1045, Morris v. Fortson, 262 Fed. Supp. 93 (3); Hanover v. Boyd, 173 Tenn. 426; 121 SW2d 120(1).

It appears from the record that the total vote cast for Weltner was 49,973 and for Lowe 27,882, with a majority for Weltner of 22,091. According to the testimony of witness Graham the total number of votes cast in the 11 precincts particularly inquired about, and being the named precincts referred to in paragraph 6 (a), (b) and (c), and in paragraph 9 of the substituted petition above referred

to, was 5,414, 4,941 of that number being cast for Weltner and 473 of that number being cast for Lowe.

In the absence of proof to the contrary, elections held under legally constituted authority are presumed to be regular and valid. Searcy v. State of Georgia, 91 Ga. App. 603 (86 SE2nd 652).

The new Election Code (Ann. Code 1967, Cumulative Pocket Part, §34-101, et seq.) provides the exclusive procedure by which an election may be declared void for malconduct or irregularities, to-wit, in a contest filed in the superior court, wherein the malconduct or irregularities must be shown to be such as would have changed the result of the election or placed the result in doubt. The consequence of other malconduct or irregularities lies with those charged with the prosecution of criminal violations of the Code. Laite v. Stewart, 112 Ga. App. 853, certiorari denied 896 (146 SE2d 553.)

Ann. Code § 34-1708(c) provides: If misconduct is complained of on the part of the poll officers of any election district, it shall not be held sufficient to set aside the contested result unless the rejection of the vote of such district would change such result.

If the votes for Weltner of 4,941 in the particular precincts above mentioned are deducted from his total of 49,973 his total would be 45,032, and if the 473 votes for Lowe in these precincts are deducted from his total 27,772, his total would be 27,409 as against 45,032 for Weltner, or a majority for Weltner of 17,623.

If to the total of 27,772 for Lowe are added the 4,941 for Weltner in the particular precincts referred to, there would be a total for Lowe of 32,823, and if this total is deducted from Weltner's total of 45,032 (being the total Weltner votes of 49,973 less 4,941), there would still be a majority in favor of 12,209.

If the total number of 5,414 votes cast in the eleven precincts for both Weltner and Lowe are rejected and deducted from the Weltner majority of 22,091, Weltner would still have a majority of 17,677.

As above indicated, §34-1703(a) provides as a ground for contest malconduct, fraud or irregularity. The substituted petition in paragraphs 6(a), 6(b) and 6(c) uses the language malconduct, fraud and/or irregularities. We do not deem it necessary in connection with this division of the opinion to review the adjudicated cases dealing with the phrase and/or nor the question of sufficiency of pleadings wherein such phrase is used. See Saylor v. Williams, 93 Ga. App. 643, certiorari denied page 912 (92 SE2d 565); Rawls v. E. R. Taylor Auto Co., 202 Ga. 107 (42 SE2d 446); Shadden v. Cowan, 213 Ga. 29, 30 (96 SE2d 608).

In none of the events predicated on the calculations above set forth, nor in any event, did the conduct of the election in the eleven precincts, whether characterized as malconduct, fraud or irregularity, operate to change the contested result of the entire election.

3. The last unnumbered paragraph under paragraph 6 or plaintiff's substituted petition is as follows: Such malconduct, fraud and/or irregularities

by poll officers at the polling places hereinbefore stated, where the electors were mainly black persons, and at almost every other polling place in the 5th District where the electors were mainly of the Black Race, in permitting such distribution of the cards were sufficient to change the result of the Primary as to that office or place it in doubt, considering what was the approximate percentage of the total votes of black electors cast as to the total of all votes cast for Mr. Weltner and Mr. Lowe together in the 5th District.

This paragraph is construed by appellant in his first supplemental brief in this court, wherein, among other things, he stated: Manifestly, the word 'electors' as so used in said sub-paragraph did not refer to persons of the Black Race who voted on September 11, but referred instead to the qualified and registered voters, whether they voted or not on September 11.**** There is certainly a difference between the number of black voters who vote at a polling place and the number qualified and registered to vote there. With this construction of this paragraph the court agrees.

With the exception of fourteen precincts in which there were no negro registered voters, and in which 2566 votes were cast for Lowe and 2638 votes were cast for Weltner, which could not change the result of the election, it does not appear from the record whether the votes actually cast in any precinct were votes of white electors or black electors nor for whom they respectively voted. Therefore, with said exception, it cannot be determined what percentage or approximate percentage of white or black electors actually voting cast their

ballots for Lowe or for Weltner.

The color line has no proper place in judicial administration. Therefore, we are not influenced here by and do not give heed to argument which relies on or emphasizes such considerations as so-called white or black or predominantly white or black voting precincts, nor to white and black elector percentages or their relation to each other in respect of electors eligible to vote at a particular polling place or at any number of polling places, as the controlling factor or evidentiary guide in determining how or for whom any elector, white or black who actually voted in an election, may have cast his or her ballot therein.

The law does not know race or color in the matter of eligibility to vote. The principle, now firmly established, of one person, one vote has relation to any person, otherwise eligible to vote, regardless of race or color. The judiciary in obedience to the obligation to do equal justice to all under law, exercises its judicial function quite without regard to race, color, or station in life, be the consequences what they may.

So we are not concerned here as to what may otherwise be reguarded as white or black or predominantly white or black voting precincts, nor are we concerned with the results of a primary election for the same office in 1966 referred to by appellant in a supplemental brief in this case, nor are we concerned with any particular group support appellant may have received in the election involved in this case.

In the case sub judice there is no evidence or statement of proposed evidence

to show that any particular person or persons voting in the election voted one way or the other as to the two candidates voted on in the election. Under our secret ballot election system third persons cannot be heard to testify how any voter not legally entitled to assistance, cast his or her bote in the election, there being higher and better evidence. Any such testimony would constitute either hearsay or a conclusion and without any probative value. See Reliance Insurance Co. v. Oliver, 117 Ga. App. 466, 469,470, and cases cited (160 SE2d 615).

In view of what is said above, the order and judgment of the trial court is affirmed.

Judgment affirmed. Jordan, P.J., and Hall, J., concur.

PLAINTIFF'S EXHIBIT 4, CONSISTING OF THREE NUMBERED PAGES, PAGES 1, 2 AND 3

VOTING SUMMARY - FULTON COUNTY — PRIMARY ELECTION SEPTEMBER 11, 1968

OFFICE OF U.S. REP IN CONGRESS FROM 5TH CONG DIST OF GA.

PREC	LOWE VOTES	%	WELTNER VOTES	%	VOTES	%	VOTES	%	VOTES	%	TOTAL VOTES	TOTAL REG VOTERS	% VOTING	WHITE REG VOTERS	NEGRO REG VOTERS
02A	292	66.1	150	33.9							442	1,162	38.0	1,151	11
02B	188	62.7	112	37.3							300	852	35.2	800	52
03	67	62.6	40	37.4							107	217	49.3	217	
06	90	80.4	22	19.6							112	264	42.4	258	6
07A	375	57.0	283	43.0							658	1,874	35.1	1,697	177
07B	93	21.4	341	78.6							434	1,468	29.5	563	905
07C	280	62.8	166	37.2							446	1,524	29.2	1,509	15
07D	134	63.5	77	36.5							211	725	29.1	710	15
07E	211	62.4	127	37.6							338	1,146	29.4	1,146	
07F	191	55.7	152	44.3							343	992	34.5	979	13
08	144	74.2	50	25.8							194	529	36.6	528	1
1A	33	14.8	190	85.2							223	1,092	20.4	38	1,054
1C	14	3.2	418	96.8							432	1,276	33.8	19	1,257
1F	97	24.9	292	75.1							389	1,348	28.9	751	595
1K	14	7.8	166	92.2							180	816	22.0	40	776
1L	18	3.6	482	96.4							500	1,334	37.4	13	1,321
10A	265	55.1	216	44.9							481	1,466	32.8	1,175	291
10B	232	67.4	112	32.6							344	1,004	34.2	919	85
11	75	64.1	42	35.9							117	286	40.9	256	30
13A	254	59.2	175	40.8							429	1,345	31.8	1,340	5
13B	250	59.7	169	40.3							419	985	42.5	985	
13C	458	56.1	358	43.9							816	2,311	35.3	2,307	4
14	130	64.4	72	35.6							202	545	37.0	545	
15	80	68.4	37	31.6							117	326	35.8	326	
16A	113	45.9	133	54.1							246	744	33.0	742	2
16B	199	35.7	358	64.3							557	2,283	24.3	2,281	2
16C	112	32.7	231	67.3							343	1,155	29.6	1,155	
16D	105	39.0	164	61.0							269	1,080	24.9	1,079	1
16E	182	39.7	277	60.3							459	1,525	30.0	1,525	
16F	106	41.6	149	58.4							255	938	27.1	935	3
16G	163	46.6	187	53.4							350	1,212	28.8	1,212	
16H	144	38.7	228	61.3							372	1,041	35.7	1,039	2
16J	284	44.4	356	55.6							640	1,847	34.6	1,845	2
16K	205	36.4	358	63.6							563	2,005	28.0	2,004	1
16L	99	39.3	153	60.7							252	767	32.8	767	
16M	230	36.5	400	63.5							630	2,227	28.2	2,223	4
16N	75	31.6	162	68.4							237	832	28.4	832	
17	46	63.9	26	36.1							72	187	38.5	165	22
18	297	72.6	112	27.4							409	1,139	35.9	1,119	20
19	199	52.4	181	47.6							380	1,177	32.2	780	397
21A	298	61.8	184	38.2							482	1,498	32.1	1,313	185
21B	444	68.3	206	31.7							650	1,937	33.5	1,927	10
22	31	57.4	23	42.6							54	149	36.2	97	52
23A	271	62.4	163	37.6							434	1,299	33.4	1,280	19
23B	183	56.7	140	43.3							323	1,048	30.8	1,019	29
23C	155	48.9	162	51.1							317	1,216	26.0	1,082	134
24A	239	65.5	126	34.5							365	955	38.2	940	15
24B	201	64.2	112	35.8							313	881	35.5	842	39
25	137	75.3	45	24.7							182	469	38.8	467	2
26	211	59.3	145	40.7							356	1,163	30.6	935	228

VOTING SUMMARY - FULTON COUNTY

PRIMARY ELECTION SEPTEMBER 11, 1968

OFFICE OF U.S. REP. IN CONGRESS, FROM 5TH CONG DIST OF GA.

PREC	LOWE VOTES	%	WELTNER VOTES	%	VOTES	%	VOTES	%	VOTES	%	TOTAL VOTES	TOTAL REG VOTERS	% VOTING	WHITE REG VOTERS	NEGRO REG VOTERS
3A	35	5.5	603	94.5							638	1,623	39.3	21	1,602
3AB	35	5.2	643	94.8							678	1,933	35.0	177	1,756
3AC	18	3.1	566	96.9							584	1,519	38.4	34	1,485
3AD	35	2.4	1,400	97.6							1,435	2,638	54.3	55	2,583
3AE	32	13.2	211	86.8							243	877	27.7	192	685
3AF	22	4.4	476	95.6							498	1,817	27.4	4	1,813
3AG	13	4.0	316	96.0							329	1,115	29.5	8	1,107
3AH	31	22.0	110	78.0							141	527	26.7	215	312
3AI	51	8.3	566	91.7							617	1,713	36.0	10	1,703
3B	33	3.7	857	96.3							890	1,768	50.3	5	1,763
3C	22	4.7	444	95.3							466	1,148	40.5	114	1,034
3D	156	56.9	118	43.1							274	1,123	24.3	1,105	18
3E	59	11.1	474	88.9							533	1,515	35.1	7	1,508
3F	140	58.1	101	41.9							241	936	25.7	796	140
3G	72	56.2	56	43.8							128	408	31.3	328	80
3H	43	4.7	867	95.3							910	2,077	43.8	23	2,054
3I	219	50.3	216	49.7							435	1,556	27.9	1,545	11
3J	253	61.0	162	39.0							415	1,357	30.5	1,194	163
3K	13	2.5	516	97.5							529	1,506	35.1	10	1,496
3L	40	8.4	436	91.6							476	1,370	34.7	214	1,156
3M	136	48.7	143	51.3							279	1,020	27.3	779	241
3N	5	8.5	54	91.5							59	221	26.6	14	207
3P	31	5.5	537	94.5							568	1,227	46.2	24	1,203
3Q	40	10.8	332	89.2							372	969	38.3	237	732
3R	35	4.6	723	95.4							758	1,759	43.0	29	1,730
3S	39	5.0	741	95.0							780	1,890	41.2	6	1,884
3T	24	5.6	407	94.4							431	1,172	36.7	4	1,168
3V	25	8.4	272	91.6							297	649	45.7	47	602
3W	38	33.6	75	66.4							113	313	36.1	312	1
3X	2	40.0	3	60.0							5	36	13.8	16	20
3Z	20	4.4	434	95.6							454	1,259	36.0	7	1,252
4A	378	61.7	235	38.3							613	1,760	34.8	1,732	28
4AB	179	51.7	167	48.3							346	963	35.9	789	174
4B	227	54.6	189	45.4							416	1,080	38.5	900	180
4D	340	60.1	226	39.9							566	1,429	39.6	1,421	8
4E	316	61.0	202	39.0							518	1,656	31.2	1,544	112
4G	395	58.1	285	41.9							680	1,703	39.9	1,643	60
4Q	273	63.9	154	36.1							427	1,434	29.7	1,432	2
4Y	36	6.9	484	93.1							520	1,399	37.1	97	1,302
4Z	377	69.3	167	30.7							544	1,394	39.0	1,358	36
5A	170	37.3	286	62.7							456	1,532	29.7	1,523	9
5B	274	59.3	188	40.7							462	1,613	28.6	1,590	23
5C	229	36.2	404	63.8							633	1,584	39.9	1,565	19
5D	390	35.6	706	64.4							1,096	2,616	41.8	2,605	11
5F	334	41.3	474	58.7							808	2,042	39.5	2,035	7
5G	244	38.9	384	61.1							628	1,889	33.2	1,877	12
5H	210	64.6	115	35.4							325	975	33.3	967	8
5J	179	31.5	389	68.5							568	1,624	34.9	1,622	2
5K	367	35.5	668	64.5							1,035	2,563	40.3	2,555	8
5L	239	27.2	639	72.8							878	2,703	32.4	2,695	8

VOTING SUMMARY - FULTON COUNTY

OFFICE OF U.S. REP IN CONGRESS FROM 5TH CONG DIST OF GA.

PRIMARY ELECTION SEPTEMBER 11, 1968

PREC	LOWE VOTES	%	WELTNER VOTES	%	VOTES	%	VOTES	%	VOTES	%	TOTAL VOTES	TOTAL REG VOTERS	% VOTING	WHITE REG VOTERS	NEGRO REG VOTERS
5M	119	30.6	270	69.4							389	884	44.0	879	5
5N	155	29.5	371	70.5							526	1,330	39.5	1,326	4
7A	27	3.5	734	96.5							761	1,517	50.1	7	1,510
7AB	59	48.0	64	52.0							123	359	34.2	357	2
7AC	295	61.1	188	38.9							483	1,253	38.5	1,140	113
7AD	27	4.2	612	95.8							639	1,035	61.7	25	1,010
7AE	34	32.4	71	67.6							105	523	20.0	322	201
7B	12	3.8	300	96.2							312	572	54.5	69	503
7C	429	59.7	289	40.3							718	1,950	36.8	1,943	7
7D	28	3.1	874	96.9							902	1,793	50.3	12	1,781
7E	128	35.3	235	64.7							363	988	36.7	673	315
7F	429	63.7	244	36.3							673	1,596	42.1	1,586	10
7G	119	50.4	117	49.6							236	840	28.0	780	60
7H	343	57.0	259	43.0							602	1,464	41.1	1,461	3
7I	367	57.7	269	42.3							636	1,725	36.8	1,615	110
7J	462	56.1	361	43.9							823	2,411	34.1	2,399	12
7K	304	46.7	347	53.3							651	2,458	26.4	2,450	8
7L	46	4.7	932	95.3							978	2,455	39.8	75	2,380
7M	408	51.7	381	48.3							789	2,070	38.1	1,932	138
7N	44	5.2	797	94.8							841	1,741	48.3	14	1,727
7P	264	36.9	451	63.1							715	1,837	38.9	1,505	332
7R	27	22.7	92	77.3							119	381	31.2	218	163
7S	200	53.8	172	46.2							372	1,155	32.2	1,130	25
7T	63	3.7	1,620	96.3							1,683	3,476	48.4	32	3,444
7U	388	62.8	230	37.2							618	1,615	38.2	1,613	2
7V	127	39.3	196	60.7							323	945	34.1	844	101
7W	90	24.5	278	75.5							368	921	39.9	588	333
7X	41	6.2	623	93.8							664	1,266	52.4	12	1,254
7Y	28	3.7	733	96.3							761	2,024	37.5	11	2,013
7Z	31	3.1	982	96.9							1,013	2,039	49.6	27	2,012
8A	205	30.3	471	69.7							676	2,006	33.6	1,995	11
8B	186	36.5	324	63.5							510	1,499	34.0	1,493	6
8C	199	23.4	651	76.6							850	1,836	46.2	1,765	71
8D	318	33.3	638	66.7							956	2,867	33.3	2,860	7
8E	180	30.4	412	69.6							592	1,778	33.2	1,728	50
8F	387	36.8	665	63.2							1,052	3,001	35.0	2,998	3
8G	135	29.9	316	70.1							451	1,250	36.0	1,250	
8I	231	33.0	470	67.0							701	1,820	38.5	1,784	36
8J	209	38.2	338	61.8							547	1,411	38.7	1,411	
8K	192	28.4	485	71.6							677	2,065	32.7	2,064	1
8L	180	33.8	353	66.2							533	1,298	41.0	1,285	13
8M	142	29.3	343	70.7							485	1,247	38.8	1,243	4
8N	216	36.5	375	63.5							591	1,468	40.2	1,452	16
91A	427	63.4	247	36.6							674	1,941	34.7	1,940	1
91B	314	62.1	192	37.9							506	1,540	32.8	1,539	1
91C	732	63.4	423	36.6							1,155	2,813	41.0	2,811	2
91D	401	60.6	261	39.4							662	1,522	43.4	1,520	2
92A	104	34.1	201	65.9							305	1,315	23.1	522	793
92B	572	64.6	313	35.4							885	2,293	38.5	2,215	78
92C	559	63.3	324	36.7							883	1,975	44.7	1,975	
92D	394	60.2	261	39.8							655	1,695	38.6	1,692	3
93A	140	74.1	49	25.9							189	593	31.8	552	41
93B	173	54.9	142	45.1							315	886	35.5	856	30
93C	294	58.9	205	41.1							499	1,198	41.6	1,198	
94C	310	64.4	171	35.6							481	1,386	34.7	1,382	4
TOTAL	27,882	35.8	49,973	64.2							77,855	213,985	36.4	151,934	62,051

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IN THE SUPREME COURT OF THE UNITED STATES

WYMAN C. LOWE,

Petitioner for Certiorari,)
) No. 1390,
vs.) October Term
) 1968
CHARLES L. WELTNER,)
)
Respondent in Certiorari,)

SUPPLEMENTAL BRIEF OF PETITIONER

Preliminarily, in order that the statements in this brief, which is supplemental to, but not in support of the petition, may be meaningful and readily understood, a summary of events, as shown in the Record that is before the Court, leading to the filing of the petition in the above styled matter will first be presented.

Wyman C. Lowe, in his petition that is before this Court, seeks a writ of certiorari for review of a judgment of the Court of Appeals of Georgia affirming a judgment of the Superior Court of Fulton County, Georgia, rendered following a hearing held on September 20, 1968 on a motion of the defendant to dismiss the case for alleged failure of the plaintiff, Wyman C. Lowe, to state a claim upn which relief could be granted and on the same motion, as a motion for summary judgment. The copy of the origi- petition and copy of return of a Deputy

Sheriff of Fulton County, Georgia, which are in Record, show the petition was filed on September 16, 1968, copy thereof and summons served the same date; and copy of the official reporter's transcript of the proceedings at that hearing that is in the Record show the hearing was held four days later. A copy of the said judgment of the Superior Court that is in the Record and another copy of it on pages ix and x of the Appendix attached beneath the petition to this Court read in part:

> ****the defendant having made a Motion to Dismiss the complaint for failure to state a claim upon which relief could be granted and a Motion for Summary Judgment; and after the citation of authority, hearing of evidence, and consideration by the Court, it is hereby ordered and adjudged that defendant's motions are granted, and the plaintiff's complaint is hereby dismissed with prejudice and judgment is granted to defendant, costs being cast upon the plaintiff."

A copy of "Co-Defendant's Motion to Dismiss" is on page ix of the Appendix and another copy in the Record. The Record discloses this was the only motion filed by the defendant and no separate motion for summary judgment was filed by him or any defendant. The copy of the original petition or complaint in the Record shows William Graham, Jr., Supervisor of Elections for Fulton County, Georgia, was named a defendant also; but copy of the amended and substituted complaint in the said Appendix, a copy also

being in the Record, shows the name of Mr. Graham, Supervisor of Elections, as a defendant, had been stricken, and he was no longer named a defendant. An entry made at the end of the amended and substituted petition and signed by Judge Morgan, before whom the hearing was held, shows the amended and substituted petition was allowed by him on September 19, 1968, and filed that date. An additional ground stated in paragraph 2 of said Motion to Dismiss was that plaintiff had failed to join an indispensable party. The copy of the reporter's transcript in the Record shows the "indispensable party" to which reference was made in paragraph 2 of the motion was the Secretary of State of Georgia. However, as indicated near the end of the copy of portions of that transcript in said Appendix, the defendant Weltner, near the end of the hearing, waived the ground stated in paragraph 2 of his motion.

The copy of portions of that transcript in said Appendix further indicates that paragraph 1 of the Defendant's Motion to Dismiss, reading "Plaintiff has failed to state a claim upon which relief can be granted", in addition to being considered as a motion to dismiss, was considered and treated as a motion for summary judgment, but that the only evidence before the Court during the hearing was the testimony of four witnesses adduced at the hearing and a Voting Summary, which was stipulated as evidence, near beginning of the hearing, by counsel for defendant Weltner. An examination of the copy of the Record that is before the Court will reveal that no affidavit, no deposition, no answers to interrogatories, and no admissions, in support of the motion to

to dismiss were ever filed for the defendant or any in defense against the motion ever filed for the plaintiff.

In the amended and substituted petition, the plaintiff contested, pursuant to the provisions of Chapter 34-17 of the Georgia Election Code, that Code being Title 34 of the Code of Georgia, the result of the Democratic Primary held on September 11, 1968, in the Fifth Congressional District of Georgia for nomination for Representative for that District in the United States House of Representatives. Weltner and Lowe had been the only candidates for such nomination in that Primary. Weltner was declared the nominee.

The opinion delivered for the Court of Appeals of Georgia on the appeal is officially reported 118 Ga. App. 635 and 164 S. E. 2d 919. Appellant Lowe filed a timely motion for rehearing in that Court of Appeals. After denial of that motion, he filed in the Supreme Court of Georgia a petition for writ of certiorari for review of the judgment of the Court of Appeals. That petition was denied.

The failure by the lower Court, namely, the Superior Court of Fulton County, Georgia, to grant any of the repeated requests made by the plaintiff, as attorney pro se, for a short recess during the September 20, 1968 hearing on defendant Weltner's motion to dismiss to permit him to amend his pleading, after the Court had stated it thought it had a duty to allow plaintiff to amend and when such amending would have removed any cause for dismissal, and the treatment by the lower Court of the motion to dismiss as

such motion and also as a motion for summary judgment when the only evidence before the Court was testimony of four witnesses adduced at the hearing and the said VOTING SUMMARY and when plaintiff had never agreed for the hearing to proceed on the motion as one for summary judgment, the motion not having been served upon plaintiff until about ten minutes after time for the hearing to begin, together with other acts of the lower Court, were a departure by that Court from the accepted and usual course of judicial proceedings and in violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution. The extent to which the Court of Appeals of Georgia, in effect, sanctioned such departure of the lower Court calls for an exercise of this Court's power of supervision.

Moreover, considering what the official reporter's transcript shows to have transpired during said hearing, the judgment of the lower Court, the apparent failure of the Court of Appeals, as shown in its opinion, to consider the question of whether the lower Court abused its discretion in not allowing plaintiff to amend after plaintiff had raised that question, among others, in his Enumeration of Errors, and considering failure of the Court of Appeals to correct other errors, it is evident that Court of Appeals, in effect, decided important state questions in ways in conflict with applicable Georgia law and the "due process" clause of the Fourteenth Amendment.

The said motion of Mr. Weltner, entitled "Co-Defendant's Motion to Dismiss", that is in the Record, indicates in the introductory paragraph it is brought under the provisions of Section 81A-112 (b) (6) and (7) of Title 81A of the Georgia Code. The first part of the title of that section is "Defenses and Objections". The said No. (7) referred to, a defense that may be made in a motion, is "failure to join anindispensable party". The said transcript of the September 20, 1968 proceedings on the motion to dismiss, most of that transcript being on pages x-xxiv of said Appendix, shows that the defendant, near the end of the proceedings, waived the Number 2 ground of his motion, which was "failure to join an indispensable party".

The only other ground stated in the motion to dismiss is in paragraph 1 thereof and is failure to state a claim upon which relief can be granted. That is the (6) in said Section 81A-112 (b) (6). The part of Section 81A-112 (b) that applied to paragraph 1 of the motion to dismiss reads:

> "Every defense, in law or fact, to a claim for relief in a pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading, except that the following defenses may at the option of the pleader be made by motion in writing: * * * (6) failure to state a claim upon which relief can be granted * * * * * * * * * * If, on a motion asserting the defense

> "numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in section 81A-156, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 81A-156."

Said quoted part of Section 81A-112 (b) of Title 81A of the Georgia Code is identical with the corresponding part of Rule 12 (b) of the Federal Rules of Civil Procedure. The new Civil Practice Act of Georgia, which became effective in August 1967, made numerous changes as to pleadings in Georgia Courts. It was modeled upon the Federal Rules of Civil Procedure, although there were some deviations in it from those Rules. The new Title 81A of the Georgia Code is a codification of that Act. The sections in Title 81A are numbered in a manner similar to the corresponding sections in the Federal Rules. Thus Section 81A-112 of the Georgia Code corresponds to Rule 12 of the Federal Rules.

With reference to "the defense numbered (6)" contained in the foregoing quotation from said Section 81A-112 (b), matters outside of the pleading that were presented to and not excluded by the Superior Court at the hearing stated were the testimony of four witnesses adduced at the hearing and the VOTING SUMMARY,

stipulated in evidence by counsel for defendant Weltner near the beginning of the hearing. However, Section 81A-156 of the Georgia Code, corresponding to Rule 56 of the Federal Rules, each entitled "Summary Judgment", in connection with determination of a motion for summary judgment, does not authorize use of testimony of witnesses adduced at the hearing of the motion.

Said quoted "(6)" of Section 81A-112 (b) requires that when a motion to dismiss may be treated as a motion for summary judgment it must be "disposed of as provided in section 81A-156, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 81A-156". Certainly the said motion was not disposed of in the manner required in Section 81A-156, "Summary Judgment". Efforts of plaintiff to obtain permission to amend in such manner as to identify additional polling places in precincts where Negro registered voters predominated and then have numerous witnesses of his present in the courtroom to testify in support of his allegations, in the last subparagraph of paragraph 6 of his pleading, of "Malconduct, fraud, and/or irregularities by poll officers * * * * at almost every other polling place in the 5th District where the electors were mainly of the Black Race", besides the 11 polling places he had identified, "sufficient to change the result of the Primary as to that office or place it in doubt", were of no avail.

In this connection, the following part of the testimony of Dr. Tibbs, a

colored pharmacist, one of plaintiff's witnesses, is quoted from that part of the reporter's transcript on page xvi of said Appendix:

> "Q. Do you have any general knowledge of any mal-conduct or fraud?
>
> BY THE COURT: This is not in issue before the Court at this time. This is a Motion to Distmiss."

When Dr. Tibbs was thus not allowed to testify about malconduct or fraud, plaintiff was precluded from having testimony of any of his many witnesses present in the courtroom having knowledge of such at about every other polling place in precincts in the 5th District where the registered voters were mainly Negroes. Plaintiff was thereby not "given reasonable opportunity to present all material made pertinent to such a motion by section 81A-156".

The following applicable part of said Section 81A-156, "Summary Judgment":

> "(c) Motion and proceedings thereon.— The motion shall be at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

> "file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined ***."

The foregoing quoted sentence of Section 81A-156 (c) is identical with the corresponding part of Rule 56 (c) of the Federal Rules, except that said part of the Federal Rule requires the motion to be served only at least ten days in advance, instead of 30 days in advance, of the time fixed for the hearing.

The judgment, having title "Order", rendered following said hearing does not contain any statement that no genuine issue of material fact had been shown.

In conjunction with petitioner's contentions herein regarding consideration of the motion as one for summary judgment, the following citations are given:

> If upon the proofs, adduced in support of motion for summary judgment, any doubt remains as to existence of genuine issue of material fact, such motion must be resolved against movant and motion denied.
>
> Carter v. Williams, 361 F.2d 189

On motion for summary judgment burden is upon moving party to establish the lack of triable issue of fact and the right to judgment as a matter of law.

Revlon, Inc. v. Regal Pharmacy, Inc., 29 F. R. D. 169

The summary judgment procedure is generally considered a drastic remedy and strict compliance with the provisions of the rule is required.

Parmelee v. Chicago Eye Shield Co., 157 F.2d 582, 168 A. L. R. 1130.

The transcript (Appendix, pages x-xxiv) discloses that the lower Court gave no notice at the beginning of or during the hearing that the motion to dismiss would be considered also as a motion for summary judgment.

Evidence in the VOTING SUMMARY, that was stipulated by defendant's attorney near beginning of the hearing, showed that more than 25,000 votes were cast for said two candidates in the polling places in precincts where Negro registered voters (electors) were in the majority. That number of votes far exceeded the number required to change or cast doubt on the result, but the failure of the Court to allow plaintiff's large number of witnesses in the courtroom to testify about very serious wrong doing and flagrant violations of elections laws as to which they were ready to testify precluded hearing before the Court testimony of even one witness for plaintiff as to such in any polling place.

The Record discloses that the Democratic Primary out of which the contest arose was held on September 11, 1968; that the contest petition was filed on September 16, 1968, the date of official declaration of the results of the Primary; and that the judgment of the Superior Court in the case was rendered on September 20, 1968. It is apparent that, under such conditions as to time, it was virtually impossible for depositions of witnesses to be taken and filed before the September 20th hearing on the motion to dismiss as such motion and also as a motion for summary judgment.

It is requested the Court take judicial notice of the following:

That, in the November 5, 1968 General Election in the Fifth Congressional District of Georgia, the names, Charles L. Weltner, as the Democratic nominee, and Fletcher Thompson, as the Republican nominee, the only candidates for said office, appeared on the official ballot; that Fletcher Thompson was officially declared the winner; that Wyman C. Lowe, within five days after date of official determination and declaration of the result, filed a petition in the Superior Court of Fulton County, Georgia, brought under the provisions of said same Chapter 34-17 of the Georgia Election Code, naming Fletcher Thompson defendant and contesting the result of the November 5th Election on the ground, among other grounds, that Charles L. Weltner, as a candidate in the General Election had not been the lawful Democratic nominee, that such fact made the result of the General Election as to that office invalid, and the General Election as to that office should be declared null and void; that Wyman C. Lowe, in the contest of the result of the November 5th General

Election, took numerous depositions of witnesses, after proper notice to the defendant of the taking, in support of his allegations in his petition that wrong doing and violations of election laws in the September 11, 1968 Democratic Primary as to said office in each of 40 Fifth District polling places in precincts where the registered voters were predominantly black persons were such as to change or place in doubt the result as to that office; and that there has not been an adjudication in that case.

Reference is made to the copy of the "VOTING SUMMARY-FULTON COUNTY-OFFICE OF U. S. REP IN CONGRESS FROM 5th CONG DIST OF GA.-PRIMARY ELECTION SEPTEMBER 11, 1968" which is on the last three pages of the Appendix attached beneath the petition for certiorari. There is a circle around identifying letter-number of each of the forty precincts in the 5th Congressional District as to which the two columns of figures on right side of each of the pages having headings "WHITE REG VOTERS" and "NEGRO REG VOTERS" show there were on September 11, 1968 more Negro registered voters than white voters. Two columns of figures on left side of each of the three pages have the headings "LOWE VOTES" and "WELTNER VOTES", respectively. Addition of the "LOWE VOTES" in the said forty precincts, as to each of which there are identifying letter-numbers in the left column, gives a total of 1,360 votes. Addition correspondingly of the "WELTNER VOTES" in those same forty precincts gives a total of 23,834. A counting of the precincts shown on the VOTING SUMMARY gives a total of 155. Thus it is shown there are 115 precincts in each of which white registered voters predominate.

The total of votes for Weltner in those 115 precincts is shown, in effect, by the VOTING SUMMARY to have been less than the total for Lowe in those 115 precincts. It is clear that the lead in votes of Weltner over Lowe in that race was in the precincts where Negro registered voters predominated. The total numbers of votes for Weltner and for Lowe are shown at bottom of the last page of the VOTING SUMMARY to be 49,973 and 27,883, respectively. Weltner is shown to have been credited with 22,091 more votes than Lowe. The VOTING SUMMARY shows that his lead over Lowe in the forty said precincts where Negro registered voters predominated was 22,474, a greater lead in those forty precincts than his lead 5th District-wide.

A copy of the entire official reporter's transcript of the proceedings at the hearing held on September 20, 1968 is in the Record, that is before the Court. A copy of most of that transcrip is on pages x-xxiv, inclusive, of said Appendix. There is included on pages xi, xii and xiii of the Appendix all of the testimony at the hearing of Mr. Graham, Supervisor of Elections for Fulton County, as to the votes for Weltner and for Lowe in precincts specifically identified by location in the amended and substituted petition as ones in which the voters were mainly black persons. The total votes for Weltner and Lowe in only eleven of said forty precincts were thus stated in the testimony of Mr. Graham, as shown on page xii of that Appendix, to be 4,941 and 473, respectively. In his testimony as to the total votes for Lowe and Weltner, as shown on page xiii of the Appendix, he gave the

same totals indicated at bottom of last page of the VOTING SUMMARY at end of that Appendix.

A part of Mr. Graham's testimony that is in the copy of entire transcript in the Record, but inadvertently omitted from the portions in said Appendix, shows he further testified that the total of 5,414 votes, obtained by adding the 473 votes for Lowe and 4,971 for Weltner cast in said eleven precincts, was not sufficient to change or cast in doubt the result of the Primary as to that office. However, a study of the VOTING SUMMARY indicates the totals of votes cast for the two candidates, in said 40 precincts, there being only one polling place in each precinct in the Fifth District, were 23,834 for Weltner and 1,360 for Lowe, a grand total of 25,194 for the two candidates together. The total of votes cast for the two candidates in those 40 precincts in that Primary was about five times as many as in the only 11 precincts considered at said hearing. The total of votes for Weltner in those 40 precincts may be obtained from the VOTING SUMMARY by adding together votes shown thereon to have been cast for him in each of the 40 precincts as to which the identifying numbers-letters circled in the left column, and the total of votes for Lowe may be obtained in like manner. Subtraction of the total number of votes for Lowe in the 40 precincts from the total number of votes for Weltner in those 40 precincts indicates that Weltner had a lead of 22,474 votes over Lowe in those 40 precincts. Subtraction of the total number of votes for Lowe in the Fifth District, those totals being at bottom of last

page of the VOTING SUMMARY, gives a lead of 22,091 votes for Weltner. A comparison of the Weltner lead in said 40 precincts, in which the VOTING SUMMARY shows Negro registered voters predominated, with the Weltner lead Fifth District-wide in all of the 155 precincts in the Fifth District, including said 40 precincts, reveals his lead in those 40 precincts was 383 votes more than than it was Fifth District-wide. A decrease of 11,100 votes for Weltner and an increase of 11,100 votes for Lowe in those 40 precincts in which Weltner was credited with 23,834 votes and Lowe credited with only 1,360 votes would have resulted in Lowe winning the nomination.

It is stated in the opinion delivered for the Court of Appeals of Georgia on the appeal that the Court took judicial notice of total number of precincts and the returns, these being in said VOTING SUMMARY. In support of that statement the following were cited:

> "31 C. J. (Evidence), Sec. 51, page 1045; Morris v. Fortson, 262 Fed. Supp. 93 (3); Hanover v. Boyd, 173 Tenn. 426; 121 SW 2d 120 (1)."

It is requested that this Court take judicial cognizance of the number of precincts and returns, as contained in the VOTING SUMMARY at end of said Appendix, and also the returns in the September, 1966 Democratic Primary in the same Fifth Congressional District with respect to the same office. The same Mr. Weltner, Kelly Brown, a lawyer, and the same Lowe were the candidates for nomination for the office in that Primary. The returns show that Lowe received more than twice

as many votes as Weltner and Brown together in the precincts where white registered voters predominated. Those returns also show that Lowe received approximately 12 per cent of the votes cast for the three candidates in the precincts where most of the registered voters were black. However, a comparison of the returns as to the said office in those two Democratic Primaries would show that Lowe received in the 1968 Primary only about two-thirds as many votes in the precincts in which black registered voters predominated as he did in such precincts in the 1966 Primary. As it was evident to registered voters in that Fifth District that Lowe, in his campaign prior to September, 1966 Primary, concentrated his main efforts, including his advertising, mainly in the areas where the majority of registered voters were white, and that he, in his campaign prior to the 1968 Primary, expended most of his efforts, including his advertising, in the areas where the most of the registered voters were black, the Court may be willing to take judicial cognizance of such difference in the conduct of the two campaigns. If the Court takes judicial notice of the fact, evident generally to registered voters of said Fifth District, that Lowe conducted a very much stronger and more expensive campaign in 1968 in the predominantly black areas prior to the September, 1968 Primary than he did in those areas prior to the September, 1966 Primary, but was credited with receiving only about two-thirds as many votes in the precincts in those areas in the 1968 Primary as he was in such precincts in the September, 1966 Primary, his allegations in his pleading

as to conditions that prevailed at the polling places in those precincts in the 1968 Primary will have greater significance. In a Democratic Primary held prior to 1966 in the Fifth District of Georgia, in which a candidate, who was not Mr. Weltner, and Lowe were the only candidates for the said office, Lowe received about 85 per cent of votes cast in precincts where registered voters were mainly Negroes.

The part of the amended and substituted petition which plaintiff sought mainly by his repeated requests to permit him to amend is the last subparagraph of paragraph 6. That subpara- reads in part as follows:

> "Such malconduct, fraud and/or irregularities by poll officers at the polling places hereinbefore stated, where the electors were mainly black persons, and at almost every other polling place in the 5th District where the electors were mainly of the Black Race * * * were sufficient to change the result of the primary as to that office or place it in doubt * * * * *"

The first request that plaintiff made during said hearing, as shown in that part of the transcript on page xiv of said Appendix, was as follows:

> "BY MR. LOWE: I am going to state now, Your Honor, I am going to request permission to amend to set out more precincts with particularity."

Plaintiff thus indicated he wished to amend by setting out additional precincts to which he had referred in said quoted subparagraph by the statement "and at almost every other polling place in the 5th District where the electors were mainly of the Black Race".

Plaintiff in his allegations gave notice to the defendant that wrong doing and violations of election laws sufficient to change or cast in doubt the result of the Primary as to that office had occurred at polling places where the electors were mainly black persons and thereby, in effect, delimited the number of polling places to 40 of the 155 in the Fifth District, there being only one polling place in each precinct in the District. It seems that the proper remedy for the defendant to have used to call for more particularity as to identity of those polling places was a motion for a more definite statement, corresponding to a special demurrer under former Georgia law on pleading and practice, if greater particularity was required by applicable law, instead of a motion to dismiss, in nature of general demurrer, which was used in Georgia until the new Civil Practice Act became effective in 1967. The Court asked counsel for Mr. Weltner during the hearing the following question:

> "BY THE COURT: Well, go back to where it is subject to general demurrer or special demurrer, isn't that ground for special demurrer to make it more particular. We are speaking of his right to amend as set forth in the particuler paragraph."

In this connection, Section 81A-112 (e) of the Georgia Code, in effect at time of the hearing, is quoted:

> "(e) Motion for more definite statement. If the pleading to which a responsive pleading is is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a proper responsive pleading, he shall nevertheless respond to the best of his ability, and he may move for a more definite statement. The motion shall point out the defects complained of, and the details desired. If the motion is granted and the order of the court is not obeyed within 15 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such other order as it deems just".

The Court of Appeals did not apply this paragraph (e) of Section 81A-112 in its ruling. That paragraph (e) is identical with the corresponding paragraph (e) of Federal Rule 12.

With respect to said quoted paragraph (e) and the last subparagraph of paragraph 6 of the amended and substituted petition, the following decisions are cited:

> If a complaint is too vague to enable the defendant to prepare his answer or prepare for trial,

he should not move to dismiss but should move for a more definite statement or bill of particulars.

Berger v. McHugh, 26 Fed. Supp. 107

Pleadings under the rules are designed for the purpose of merely giving notice and the details of claims and defenses are to be elicited by discovery, admissions and pre-trial procedures.

McDonald v. Astor, 21 F. R. D.159

Subdivision (e) of this rule may only be invoked when the pleading is so vague or uncertain that the defendant cannot adequately prepare responsive pleadings; the short, direct and responsive pleading required by rule 8 (a) should be encouraged; and rule 8 (a) should not be nullified by too liberal construction of subdivision (e) of this rule.

Walling v. Black Diamond Coal Mining Co., 59 Fed. Supp. 348

No reference is made in any way in the opinion delivered for the Court of Appeals to the contents of Number 1 and 4 of appellant's Enumeration of Errors, which relate to issues raised in the hearing in the lower Court as to whether or not there was requirement under applicable law for plaintiff to identify in his pleading each of the additional polling places to which he referred in the last subparagraph

of paragraph 6 of his pleading as "almost every other polling place in the 5th District where the electors were mainly of the Black Race" and, if there was such requirement, whether or not his request for a short recess to permit him time to amend his pleading should have been granted. A copy of the Enumeration of Errors he filed timely in that Court of Appeals is on pages xxv and xxvi of said Appendix.

In this connection, the following decisions are cited:

> Error in disallowing a proffered amendment germane to cause of action set forth in original petition rendered nugatory all subsequent steps in trial of cause.
>
> Woodward v. Fuller, 98 S. E. 323, 148 Ga. 239
>
> Amendment elaborating facts already alleged in petition allowable.
>
> Stan-Rich Co. v. Schneider, 123 S. E. 2d 166, 105 Ga. App. 748
>
> Defect of failure to attach bill of particulars where required must be taken advantage of by special demurrer.
>
> Brown v. McClelland, 155 S. E. 2d 660, 115 Ga. App. 617
>
> Generally, a pleading may be amended at any time before final order

sustaining general demurrer, or motion to dismiss in nature of general demurrer,

215 Ga. 507, 87 S. E. 2d 52

On motion to dismiss amendable defect was disregarded.

Simmons v. Eagle Seelatsee, 244 F. Supp. 898, affirmed 384 U.S. 209

The allegations in the amended and substituted petition were not delimited to wrong doing by only poll officers in polling places where registered voters were mainly black persons. The allegations in some of the subparagraphs show, in effect, there were violations of election lawsby campaign workers for Mr. Weltner in their distribution of campaign cards, each having at its top the title "OFFICIAL VOTER GUIDE", inside polling places or within 50 feet thereof. Such distribution was in violation of that part of Section 34-1703 (a) of the Georgia Election Code reading:

"(a) No persons, with the exception of candidates, shall solicit votes in any manner or by any means or method, nor shall any person distribute any campaign literature, newspaper, booklet, pamphlet, card, sign, or any other written or printed matter of any kind in support of any person, party, body, or proposition on any primary of election day within two hundred fifty feet (250') of any polling

"place or of the outer edge of any building within which such polling place is established, whichever distance is the greater."

It was not ncessary to plead applicable state law.

Paragraph 9 of the amended and substituted petition, which alleges wrong doing, but does not allege wrong doing by poll officers, reads:

"9. In the polling place at Washington High School Building and in other polling places on display where the electors were mainly black person, the sample ballot on display to electors contained the name of Mr. Weltner as a candidate for Congress, but not the name of Mr. Lowe as such candidate."

Paragraph 10 of the amended and substituted petition is quoted next:

"10. A section of said Code provides that the state executive committee of any political party may adopt and promulgate rules governing any primary of that party. Such Rules of the State Democratic Executive Committee of Georgia then effective provided that any candidate for an office in a Democratic Primary would be allowed representation among poll officers, including clerks and assistant managers, insofar as practicable. A list of fifteen names of persons qualified to be

"poll officers were submitted to a proper election party official by an agent for Mr. Lowe for use at the polls on said day, but the entire list was rejected or none on it used that day. Irregularities and fraud resulted in many polling places in the black areas for which such suggested poll officers were intended because of their not being assigned to such duty, many poll officers whose names suggested by or for Mr. Weltner having been assigned to such duty."

Thus, there were in the amended and substituted petition, in addition to allegations as to wrong doing by poll officers, allegations, in effect, as to wrong doing and violations of election laws by others, including the unlawful distribution of campaign cards by campaign workers for Mr. Weltner within the distance from a polling place prohibited by Section 34-1703 (a), the display in some of said kinds of polling places of sample ballots having thereon the name of Weltner as a candidate for said office, but omitting the name of Lowe as such candidate, the refusing by a party official to grant request of Lowe for representation at polling places by persons as poll officers whose names appeared on a list submitted by an agent for him to a proper election party official. The said transcript does not show that the lower Court took cognizance of or in any way considered such additional allegations in connection with its consideration of and granting of

the motion to dismiss as such motion and also as a motion for summary judgment and its not allowing any of plaintiff's many witnesses in the courtroom to testify as to wrong doing, including violations of election laws. The only reference made in any way in the opinion of the Court of Appeals to any of said additional allegations is in the last sentence of the first subparagraph of paragraph 2 of the opinion, wherein reference is made to an allegation in paragraph 9 of plaintiff's pleading as to display of an improper sample ballot at one polling place, although it was alleged in said paragraph 9 such display of improper ballot card was made also "in other polling places". However, plaintiff's statement in Number 2 of his Enumeration of Errors as to his witnesses not being allowed to testify related also to some of them not being allowed to testify with respect to said additional allegations.

Petitioner asserts as only part of his grounds for writ of certiorari for review of the judgment of the Court of Appeals the sanctioning by that Court of Appeals of the failure of the lower Court to grant plaintiff's request for recess to amend by identifying said additional polling places so that, because of allegations of wrongful acts of only poll officers, such amending would lead to or result in rejection of the votes in all or almost all the polling places in precincts where the registered voters were predominantly black persons. He asserts also as part of his grounds for such writ of certiorari the sanctioning, in effect, by that Court of Appeals of the addi-

tional acts and failures to act of the lower Court to which references have been made hereinbefore and which involved wrongful acts by persons other than poll officers, including the wrongful acts by other persons indicated on pages 19-22, inclusive hereof, that constituted departures from the usual course of judicial proceedings, but that probably would not lead to rejection of all the votes for the two candidates in all or almost all of the polling places in precincts where registered voters were mainly of the black race.

The fact the lower Court would not, in effect, allow Dr. Tibbs, plaintiff's witness, to answer plaintiff's question as to whether he had "any general knowledge of any mal-conduct or fraud", as is shown in copy of part of said transcript on page xvi of said Appendix, prevented plaintif from obtaining testimony from Dr. Tibbs and some of plaintiff's other witnesses then in the courtroom in support of his allegations in paragraph 7 of his amended and substituted petition. The allegations in that paragraph 7 were made in accordance with grounds of contest authorized in Section 34-1703 (c) of the Georgia Election Code. That paragraph 7 reads:

> "7. Illegal votes were received and legal votes rejected at the polls within the 5th District on that day for that office sufficient to change the result of the Primary or to leave it in doubt."

THEREFORE, it is submitted that the petition for certiorari should be granted.

Respectfully submitted,

CHARLES E. MUSKETT
Attorney for Petitioner

1084 E. Cleveland Avenue
East Point, Georgia 30344

AFFIDAVIT AS TO SERVICE

COUNTY OF FULTON, GEORGIA.

I hereby certify that I have, in compliance with Rule 33 of this Court, on this date, June 28, 1969, served a copy of the foregoing Supplemental Brief of the undersigned Petitioner for Certiorari upon counsel who were of record for said Respondent in Certiorari in this case in State Courts of Georgia by depositing a copy in an envelope, addressed to Alston, Miller and Gaines, Attorneys at Law, at their offices, Citizens and Southern National Bank Building, Atlanta, Georgia, 30303, with sufficient postage attached to this envelope to insure its delivery.

WYMAN C. LOWE

Duly sworn and subscribed to before me, this 28th day of June, 1969.

Elaine D. Underwood
NOTARY PUBLIC
Notary Public, Georgia State at Large
My Commission Expires April 16, 1973